TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914915

No. 465

THE CUYAHOGA RIVER POWER COMPANY, APPELLANT,

vs.

THE CITY OF AKRON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED MAY 15, 1915.

(24,729)

(24,729)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 985.

THE CUYAHOGA RIVER POWER COMPANY, APPELLANT,

vs.

THE CITY OF AKRON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 18, 1915.

1 UNITED STATES OF AMERICA,
Northern District of Ohio,
Eastern Division, ss:

Record of the proceedings of the District Court of the United States within and for the Eastern Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said Court, begun and held at the City of Cleveland, in said District, on the first Tuesday in April, being the 7th day of said month in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States of America, the one hundred and thirty-eighth, to wit, on Tuesday, the 7th day of July, A. D. 1915.

Present: Honorable John M. Killits, United States District Judge.

No. 192. Equity.

THE CUYAHOGA RIVER POWER COMPANY
vs.
THE CITY OF AKRON, a Municipal Corporation.

Said action was commenced on the 14th day of July, A. D. 1913, and proceeded to final disposition at the term and day above written, and during the progress thereof, pleadings and papers were filed, process was issued and returned and orders of the Court were made and entered in the order and on the dates hereinafter stated, to-wit:

2 (*Bill of Complaint. Filed Jul-* 14, 1913.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 192. Equity.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
vs.
THE CITY OF AKRON, a Municipal Corporation, Defendant.

Bill of Complaint.

To the honorable the Judges of the District Court of the United States for the Northern District of Ohio, Eastern Division:

I. The Cuyahoga River Power Company, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, and a citizen and resident of said State of Ohio and of the City of Cleveland, in the Northern District of Ohio, Eastern Division, brings this its bill against The City of Akron, a municipal cor-

poration organized and existing under and by virtue of the laws of the State of Ohio, a citizen and resident of said State of Ohio, and in the Northern District of Ohio, and the Eastern Division.

And for its cause of action plaintiff states:

II. That the amount in controversy herein, exclusive of interest and costs, exceeds the sum and value of $3,000.00. That this suit arises under the constitution and laws of the United States.

III. That Articles for the incorporation of the plaintiff company were filed in the office of the Secretary of State at Columbus, Ohio, on the 29th day of May, 1908. The plaintiff's name was therein stated as "The Big Cuyahoga Light, Heat & Power Company"; on the 12th day of November, 1908, by amendment of its Articles of Incorporation duly made and certified plaintiff's corporate name was changed to, and now is, "The Cuyahoga River Power Company."

3 That on the 12th day of January, 1912, the plaintiff, by a further amendment of its Articles of Incorporation, duly made and thereafter duly filed and recorded on February 2, 1912, in the office of the Secretary of State of Ohio, amended the original purpose clause of its charter, so as to state the purposes of its organization and its said purposes ever since and now are, as in the next paragraph set forth.

IV. That plaintiff is duly incorporated and organized for the purposes of acquiring, erecting, building, maintaining and operating a dam, or series of dams in the Big Cuyahoga River, Tuscarawas River, Mud Brook, Brandywine and Tinkers Creek, and the tributaries of each of them, being situated in Cuyahoga, Medina, Summit, Portage, Stark, Geauga, Tuscarawas and adjacent counties, in the State of Ohio, to raise and maintain a head of water; of constructing, maintaining canals and locks and race ways, to regulate and carry said head of water to any plant or power house where electricity is generated; of using said water as power in generating and producing electricity; of constructing, erecting or maintaining tubes, pipes or conduits through which electricity may be carried and transmitted, and a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity; of acquiring, producing, manufacturing, generating, transmitting or selling electricity for light, power and other purposes of supplying and selling electricity to municipalities and other public agencies; of acquiring, holding and selling franchises and privileges to supply the same to municipal corporations; of acquiring by condemnation, lease, purchase or otherwise, and of possessing, holding and selling such real estate and personal property as may be necessary or conve-

4 nient for the proper conduct of said business, and of doing any and all other things necessary and incident to any of said purposes; that the said purpose clause of plaintiff's charter, as so amended, sets forth that the improvements plaintiff will construct, not to be located at a single place, will be for the purpose of transmitting and conducting electricity and will have its eastern terminus at or near the Village of Burton Station in Geauga County; its western terminus at or near the confluence of Tinkers Creek and the

Cuyahoga River in Cuyahoga County, and its southern terminus at or near Canal Dover in Tuscarawas County, and with its main line and branches will pass in or through the counties of Cuyahoga, Summit, Medina, Portage, Stark, Geauga and Tuscarawas in said State.

V. That after its incorporation and organization, the plaintiff in the exercise of its charter powers, did, on the third day of June, 1908, procure a plan of the Roberts-Abbott Co., Consulting Engineers, for the developments contemplated by its charter and at great cost and expense caused surveys, plans, maps, plats and profiles to be made therefor; it likewise located and definitely defined the property rights and other privileges required therefor, and at great cost and expense, it caused estimates of the cost of construction to be made and provided; and having so determined upon and defined said proposed improvements, the project as aforesaid together with the plans, surveys, plats, profiles and estimates were then and there adopted and approved by Plaintiff's Board of Directors as defining the improvement then to be undertaken by it.

The said Resolution approving and adopting the said Plan was in the following terms:

"Resolved that the plan, reports and surveys of the Roberts-Abbott Company be approved and adopted and that this Company proceed forthwith to construct and build the improvements set forth in the reports and surveys and in the manner therein set forth;

"Resolved, further, that said plan, reports and surveys of the Roberts-Abbott Company be made a part of the corporate records of the Company, and that they be properly marked for identification."

Pursuant to said plan plaintiff determined to construct among other improvements, a dam at or near Portage Street in the Village of Cuyahoga Falls on the site of the lower dam of the Falls Clutch and Machinery Co. The crest of said dam was fixed at an elevation of 1,000 feet above sea level, making the height thereof substantially seventy (70) feet. And plaintiff determined to conduct the water of said river from said dam so constructed along the left bank of said river at an elevation slightly less than 1,000 feet above sea level by means of a suitable canal or conduit, to a point on said left bank a short distance westerly of the west corporation line of Cuyahoga Falls at which point the bed of said river is at an elevation of 760 feet above sea level, and plaintiff proposed by means of a hydro-electric plant there to be constructed and equipped and suitably adapted for the purpose, to convert the water power from the resulting 236 feet of fall into electric energy.

Descriptions of the several parcels of property required for said project adopted as aforesaid, were submitted to plaintiff at said Directors' meeting June 3, 1908, and were then and there duly adopted.

Said descriptions of property were as follows:

C. M. Walsh—Parcel No. 1 (Walsh Milling Co.).

Beginning at the intersection of the center of the Cuyahoga River at the north side of Portage Street, in the Village
6 of Cuyahoga Falls, Summit County, Ohio; thence westerly along the north side of Portage Street to the intersection of the high bank of the west side of the Cuyahoga River and the north side of Portage Street; thence northerly along the said high bank on the westerly side of the Cuyahoga River to a point 30 feet north of the crest of the dam, as now located, of the Walsh Milling Company; thence easterly to the center of the Cuyahoga River to a point approximately 30 feet north of the crest of aforesaid dam; thence southerly along the center of the Cuyahoga River to the place of beginning. Containing approximately 0.5 acres with all the privileges, easements and appurtenances thereunto belonging.

C. M. Walsh—Parcel No. 2.

Beginning at a point in the center of Prospect Street in the Village of Cuyahoga Falls, Summit County, Ohio, on the high bank of the Cuyahoga River on the easterly side thereof; thence easterly along the center of said Prospect Street to the high bank on the westerly side of said River; thence northerly along the high bank of said river to the north line of said C. M. Walsh's property where same joins the property of the Walsh Paper Company; thence easterly, following the said north line of C. M. Walsh's property across the Cuyahoga River to the high bank on the easterly side of same; thence southerly along the high bank to the easterly side of said Cuyahoga River to the place of beginning. Containing 0.9 acres more or less, with all the privileges, easements and appurtenances thereunto belonging.

The Falls Rivet & Machine Company—Parcel No. 1.

Beginning at the point of intersection of the center of the Cuyahoga River and the north line of Portage Street, in the Village of Cuyahoga Falls, Summit County, Ohio; thence northerly along the center of said River to a point approximately 30 feet north
7 of the crest of the Walsh Milling Company's dam, as now located; thence easterly to a point on the high bank of the Cuyahoga River on the easterly side thereof, said point being approximately 30 feet north of the crest of the aforesaid Walsh Milling Company's dam; thence southerly along the high bank on the easterly side of the Cuyahoga River to the north line of Portage Street; thence westerly along the north line of Portage Street to the place of beginning. Containing approximately 0.4 acres more or less, with all the privileges, easements and appurtenances thereunto belonging.

The Falls Rivet & Machine Company—Parcel No. 2.

Beginning at a point on the westerly bank of the Cuyahoga River, said point being north 34 degrees and 35 minutes east 380.16

feet, and north 32° east 89.1 feet from a stone set in the north line of Chestnut Street in the Village of Cuyahoga Falls, Summit County, Ohio, both of these lines being along lines owned by the heirs of J. Millbank: thence in a line which passes through a recess which is cut into a large rock near the east edge of the water of the Cuyahoga River to receive the end of the timber of the "Chuckery" dam, and through a point on the west side of the gorge south of the husk or wheel house, which point is about 24 feet south of a mark cut in the perpendicular rock on said west side near the bottom by F. D. Paul and G. B. Turner, the east end of said line being on the top of the east bank of the river: thence north 31° 45′ east 237.6 feet: thence north 10° east 258.72 feet: thence north 14° east 178.21 feet: thence north 80 degrees 45′ west 99 feet along the south line of the Cyrus Prentis tract. The west end of this line may also be found by beginning in the east line of Front Street 1.69 chains north 9 degrees 15′ east of the first angle in the east line
8 of said Front Street south of Broad Street, and which line is also 21 links south of the center line of Prospect Street: thence along the easterly line of land belonging to Fannie S. Beebe to the southeasterly corner of her land: thence along the southerly line of said Fannie S. Beebe's land one rod: thence in a southerly direction to a point one rod westerly from the place of beginning: thence one rod east to place of beginning. Containing approximately 1.5 acres, more or less, with all the privileges, easements and appurtenances thereunto belonging.

Turner, Vaughn & Taylor.

Beginning at the intersection of the westerly high bank of the Cuyahoga River and the north line of Portage Street in the Village of Cuyahoga Falls, Summit County, Ohio: thence westerly along the north line of Portage Street 49½ feet: thence southerly across said Portage Street to the south line of same: thence easterly along the south line of said Portage Street 49½ feet to the said westerly high bank of the Cuyahoga River: thence southerly along the high bank of the Cuyahoga River on the westerly side thereof and following the meanderings of same, across Broad Street in said Village of Cuyahoga Falls, Summit County, Ohio, to the dividing line between the property of said Turner, Vaughn & Taylor Company and the property of the Walsh Paper Company: thence easterly across the Cuyahoga River to the southeast corner of the property of said Turner, Vaughn & Taylor Company on the easterly high bank of said Cuyahoga River: thence northerly along the high bank of said Cuyahoga River on the easterly side thereof and following the meanderings of same across Broad Street in said Village of Cuyahoga Falls, and across Portage Street also in said Village of Cuyahoga Falls, to the northerly line of said street: thence westerly along the north line of said street to the place of beginning. Containing approximately 6.3 acres more or less, with all the privileges, easements and appurtenances thereunto belonging.
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The Walsh Paper Company.

Beginning at the intersection of the westerly high bank of the Cuyahoga River in the Village of Cuyahoga Falls, Summit County, Ohio, and the dividing line between the property of said Walsh Paper Company and the property of Turner, Vaughn & Taylor Company; thence southerly along the high bank of the Cuyahoga River on the westerly side thereof and following the meanderings of same to the line between the property of the said Walsh Paper Company and the property of C. M. Walsh; thence easterly across the Cuyahoga River to the southeast corner of the property of said Walsh Paper Company, said corner being on the easterly high bank of said River on the easterly side thereof and following the meanderings of same to the southeast corner of the property of Turner, Vaughn & Taylor Company, said corner being also the dividing line between the property of Turner, Vaughn & Taylor, and the said Walsh Paper Company; thence westerly across the Cuyahoga River to the place of beginning. Containing approximately 0.8 acres, more or less, with all the privileges, easements and appurtenances thereunto belonging.

Fannie S. Beebe.

Beginning at the northeast corner of said Fannie S. Beebe's property on the north line of Prospect Street and on the west side of the Cuyahoga River, in the Village of Cuyahoga Falls, Summit County, Ohio; thence southerly along the west line of said Fannie S. Beebe's property to the southwest corner of same; thence easterly along the line between the property of said Fannie S. Beebe and the property of The Falls Rivet & Machine Company; thence northerly along the line between the property of said Fannie S. Beebe and the property of The Falls Rivet & Machine Company, said line being the easterly line of the property of said Fannie S. Beebe, to the south line of Prospect Street; thence westerly along the south line of Prospect Street to the place of beginning, being all of the lot of land belonging to Fannie S. Beebe lying south of Prospect Street and west of the Cuyahoga River. Containing .67 acres of land more or less, with all the privileges, easements and appurtenances thereunto belonging.

A. B. & C. R. R. Company.

Beginning at an iron pin in the southwest corner of said Railroad Company's land, said pin being on an island in the Cuyahoga River; thence north 1 degree and 20′ east along said Railroad Company's west line to a point 100 feet distant from the center of the Cuyahoga River, measured at right angles with same; thence southeasterly to the south line of said Railroad Company's property at a point 100 feet distant from the center of the Cuyahoga River, measured at right angles with same; thence along the south line of said Railroad Company's land to the place of beginning. Containing — acres more or less, with all the privileges, easements and appurtenances thereunto belonging.

Henry A. Everett.

Beginning at the point of intersection of the center of the Cuyahoga River and the north and south township line between Portage Township and Cuyahoga Falls Township; thence north 0 degrees and 30′ east 100 feet; thence easterly and southeasterly along the northerly bank of said Cuyahoga River 100 feet distant from the center line of said River, following the meanderings of same, to a point on the line between the property of said Henry A. Everett and the property of the A. B. & C. R. R. Company, said point being
11 100 feet distant from the center of the Cuyahoga River, measured at right angles with same; thence southerly 1 degree and 20′ west along said line between the property of Henry A. Everett and the property of the A. B. & C. R. R. Company to the southwest corner of the property of said A. B. & C. R. R. Company; thence southerly 88 degrees east of the south line of the property of the A. B. & C. R. R. Company, said line being the dividing line between the property of the A. B. & C. R. R. Company and the property of Henry A. Everett, to a point 100 feet distant from the center of the Cuyahoga River, measured at right angles with same, thence southeasterly and northeasterly along the northerly bank of the Cuyahoga River 100 feet distant from the center line thereof, and following the meanderings of same, to a point on a line of the land of said Henry A. Everett, said line being an extension northerly of the east line of Tract No. 3, Portage Township, Summit County, Ohio, and also being 100 feet distant from the center of the Cuyahoga River measured at right angles with same; thence northerly along said line to a stone pipe; thence northerly along the high bank of the Cuyahoga River and one rod westerly on same the following courses and distances: 34 degrees 35′ east 264 feet; thence northerly 27 degrees 35′ east 286.44 feet; thence northerly 2 degrees 30′ west 116.16 feet; thence northerly 24 degrees 10′ west 138 feet; thence northerly 8 degrees 40′ east 107.6 feet; thence northerly 19 degrees 31′ east 108.31′ east 108.24 feet; thence northerly 53 degrees 40′ east 454.7 feet; thence northerly to the northeast corner of the lot owned by Tom Patterson; thence northerly following along the westerly bank of said Cuyahoga River to the southeast corner of the property of the Falls Rivet & Machine Company; thence along the line between the land of The Falls Rivet & Machine Company and the property of Henry A. Everett to a point
12 on the easterly bank of said River 100 feet distant, measured at right angles with the center of said river.

That plaintiff, by reason of the steps hereinbefore set out, became substituted to all of the rights of the riparian owners on the Cuyahoga River in Summit County and described in its charter, and became, in truth and in fact, the riparian owner on such portion of the river, absolutely as to third parties, and conditionally as to the then holders of title.

VI. That thereafter, and during the year 1908, the plaintiff made further examination and surveys of the watershed of the Cuyahoga River, and found it necessary to provide for the construction of a

reservoir in the County of Geauga by means of which to store, increase and equalize the flow of said river. It found it necessary also to provide for a diversion of a portion of the water of said river at or near Gaylords Bridge above the Village of Cuyahoga Falls, into and to the basins of Mud Brook and Brandywine Creeks in Summit County, and there to provide additional dams and reservoirs, and thence carry the water by means of canals, conduits and aqueducts to the easterly bluff of the Cuyahoga River, near the Village of Vaughn where, at an elevation of 993 feet above sea level, a fall of 358 feet is obtainable from which point the water, after passing over the wheels of the plaintiff, is returned to said river. The plaintiff found it necessary further to construct an additional hydro-electric plant at said Village of Vaughn to utilize the power there thus obtained for electric energy.

VII. That plaintiff caused surveys, maps, plans and profiles and other details for these improvements to be prepared; and thereafter, to wit, on the 23d day of April, 1909, its Directorate committed itself to and adopted a plan and development program in accordance therewith, and supplemental to and additional to the plan
13 first above described. The resolution approving and adopting the said Supplemental Plan was as follows:

"Be it resolved, that the plans, surveys and report of The Roberts-Abbott Co., be, and the same are, hereby amended by the adoption of the Plans, Surveys and Reports of H. A. von Schon dated Dec. 29, 1908, and also that the development program of this Company be hereby fixed and determined as the same is set forth in said Report of H. A. von Schon upon pages 25 to 27 inclusive of the original copy, as follows, to wit:

First. To construct a reservoir across said river south of Burton Station, in Geauga County, Ohio. Second. To carry the water of said river from said reservoir in and down the natural channel of the river to the town of Cuyahoga Falls, where a dam is to be erected below the Gaylord Bridge, at the northern boundary of Cuyahoga Falls at an elevation of 993 feet. Third. To cut a channel from the Cuyahoga River about 2 miles above Gaylord Dam to connect with Silver Lake whose elevation is now about 993 feet. Fourth. To connect Silver and Little Lakes by a channel. Fifth. To cut a channel from Little Lake to the Mud Brook channel. Sixth. To close Mud Brook by a dam, above the iron bridge crossing, raised to an elevation of 993 feet. Seventh. To widen Mud Brook and Brandywine channels to the north end of the Brandywine Basin. Eighth. To close Brandywine Basin by a dam to be located near the Cleveland Boys Farm, raised to the elevation of 993 feet. Ninth. To cut canal from the Brandywine Dam following the 995 foot contour passing Little York Bridge on the south, and terminating at the Brandywine defile about 1/3 of a mile west of Little York. Tenth. To construct a flume across the Brandywine Gorge. Eleventh. To cut a canal from the Brandywine Ravine one-half a mile
14 westerly to the first north and south road west of Little York and there to terminate in a bulkhead. Twelfth. To lay and construct a pipe line from this canal bulkhead down the incline

o a point on the Brandywine 500 feet east of the State Canal. Thirteenth. To construct a power station at the point where said pipe line terminates. Fourteenth. To widen and deepen the Brandywine at this point to its junction with the Cuyahoga River. Fifteenth. To enlarge the present culvert by which the Brandywine passes under the State Canal. Sixteenth. To construct a transmission line to the market point.

Plaintiff has attached hereto for reference its blue print maps Numbered 1, 2 and 3 respectively showing in detail its proposed improvements as here outlined, and marked "Exhibit A", herewith filed and prayed to be taken as a part of this bill.

VIII. That on the 8th day of April, 1912, having caused surveys and plans to be made for all that portion of the improvements to be built by it located in Portage and Geauga Counties and having adopted such surveys and plans, the plaintiff determined to proceed with the construction of its storage reservoir in the County of Geauga as set forth in the item number one of the development program aforesaid. It was then determined to locate said storage reservoir south — the Vaillage of Burton Station, and construct the same to an elevation of 1,120 feet above sea level with a storage capacity of 140,250 acre feet, and providing for the maintenance of a minimum flow of 300 cubic feet per second or over 200,000,000 gallons daily into the Cuyahoga River from said reservoir, it being the purpose of the plaintiff to preserve and store in said reservoir, the entire water supply of said river basin above said dam, and control the same in such manner so that the minimum flow aforesaid may be maintained. At the same time the plaintiff further determined to proceed with the construction of the Gaylord Dam as provided in said development program. That at that date, April 8th, 1912, complete surveys, maps and descriptions of all lands necessary to be acquired by it for the construction of its reservoirs and dams and for the riparian rights and easements along the Cuyahoga River through the Counties of Geauga, Portage and Summit to the Gaylord Bridge at Cuyahoga Falls were before plaintiff's Board of Directors, and said surveys and maps had been or were then definitely adopted by the plaintiff; and the plaintiff's proposed improvement was definitely outlined, fixed and determined.

Plaintiff has hereto attached a schedule showing the various proceedings taken by it from the date of its organization to May 7, 1912, to perfect its plans of development, adopt its locations and to purchase or appropriate the necessary lands, easements, water rights, etc., said schedule being made a part hereof and marked "Exhibit B."

IX. That neither the defendant nor any person, corporation or body politic had theretofore ever made any locations, surveys or appropriations of any of the waters of the Cuyahoga River for the purpose of utilizing its waters and water power for any public use and said proceedings and locations of plaintiff were for a public use and were prior in point of time to all such proceedings and steps as have been taken by defendant, as hereinafter alleged, to appropriate and acquire property rights in the waters and bed of said river;

that plaintiff by virtue of its incorporation and organization, and its various proceedings taken as aforesaid, has acquired the prior right and franchise over every other person, corporation and body politic to appropriate and acquire the lands, waters, water rights,
16 riparian rights, easements and other privileges on the Cuyahoga River for a public use and now has therein an exclusive location and exclusive franchises, water rights and property rights for the purpose of developing and utilizing the water power thereof and to construct, maintain and operate the several improvements provided for in its charter and by its said development program; that by virtue of its said acts and proceedings plaintiff has acquired and now has the exclusive franchise to develop and utilize for a public use the water of the Cuyahoga River according to its said development programs heretofore duly adopted as aforesaid and that said franchise is superior and prior in point of time and right to any powers, rights and franchises which defendant may have acquired or can acquire in said river.

That plaintiff by reason of the steps hereinbefore set out, became substituted to all of the rights of the riparian owners on the Cuyahoga River, and became, in truth and in fact, the riparian owner on such river, absolutely as to third parties, and conditionally as to the holders of title.

X. That on the 7th day of May, 1912, the plaintiff's plans and project for the conservation and utilization of the water of the Cuyahoga River from its lower dam near the Village of Cuyahoga Falls as hereinbefore described, to its upper reservoir in Geauga County, and the development thereof through the basins of Mud Creek and Brandywine Creek, were fully perfected and adopted by it, and all matters were ready for the active work of construction of said improvements, and construction had been commenced on important portions of its project.

XI. That after the 3rd day of June, 1908, plaintiff began proceedings in the Probate Courts of Summit and Portage Counties to appropriate and acquire for the construction of its said
17 works, all the lands, rights, and easements and water privileges required therefor, below the Village of Kent (except the Munroe Falls site), and that the proceedings therefor have been followed up with due diligence; that condemnation proceedings instituted by plaintiff are now pending in courts of record of the State of Ohio as follows:

(1) In the Supreme Court of the State of Ohio, #13444, The Northern Realty Co., Plaintiff in Error, vs. The Cuyahoga River Power Co., Defendant in Error.

Filed in Probate Court of Summit County February 3, 1911; decision of Circuit Court rendered October 27, 1911, was that the description of the property, the subject of the proceeding, and being the same property referred to in paragraph V hereof as belonging to Henry A. Everett, was as specific as it could be made.

(2) In Probate Court of Portage County entitled "The Cuyahoga River Power Co., Plaintiff, vs. William S. Kent and Mary P. Kent, Defendants.

No. 2369, filed May 7th, 1912.

(3) In the Probate Court of Summit Co., entitled "The Cuyahoga River Power Co., a corporation, Plaintiff, vs. The Falls Heat, Light & Power Co., a corporation; the Walsh Paper Company, a corporation; Cornelius M. Walsh and Jennie M. Walsh, wife of defendant Cornelius M. Walsh, Defendants.

No. 4610, filed April 9, 1913.

The property, the subject of the said proceeding, is the same property referred to in paragraph V hereof as belonging to C. M. Walsh and the Walsh Paper Company, C. M. Walsh Parcel No. 1, C. M. Walsh Parcel No. 2, and the Walsh Paper Company.

XII. (1) That plaintiff has at great cost and expense procured plans for the distribution of its product after the completion of its proposed power plants as follows:

(1) Plan and proposed contract for supplying the City of Cleveland,

18 (*a*) With entire output.

(*b*) With 20,000,000 Kw. hours annually.

(2) Plan for supplying the Cleveland Electric Illuminating Company with its entire output.

(3) Plan for supplying defendant, The City of Akron, with its entire output, see offers made to said City in September and October, 1912.

(4) Option on Kent Water & Light Co. and plan for supplying Kent and Akron from Kent plant pending completion of Power House at Vaughn.

(2) That plaintiff in February, 1912, procured under the laws of the State of Ohio the due incorporation of The Western Reserve Water Co. in order to utilize the waters of the Cuyahoga River and the storage of its proposed reservoirs for purposes of domestic water supply to whatever extent the necessity for such use developed, and procured at great cost and expense plans and surveys therefor.

Said The Western Reserve Water Co. has had negotiations with the cities of Youngstown, Warren, Kent and Cleveland and with defendant and plaintiff believes a great saving of money can be made by a combination of both functions in one development and a better, cheaper and safer service given to the public.

(3) That plaintiff has taken the steps required by law to increase its capital stock from $10,000 to $3,000,000 common and $2,000,000 preferred, and has applied to the Public Service Commission of Ohio for authority to make immediate required issues thereof.

XIII. That the plaintiff has proceeded with due diligence and in good faith in the acquisition for a public use of said locations, franchises, water rights and property rights, in the making of all necessary surveys, plans, maps and descriptions, in the making of

19 its locations of routes, courses and sites, in its negotiations with the owners of said properties, water rights and privileges for the purchase of the same, and where such negotiations had failed, through inability to agree upon the amount of compensation to be paid for such properties, in the prosecution of subsequent con-

demnation proceedings with the object of appropriating the same, according to law; that in order to carry out these various steps and proceedings plaintiff has expended large sums of money and has caused its securities to be sold up to the amount of three hundred and fifty thousand dollars ($350,000), par value; and that such securities are now held by bona fide purchasers for value; that such proceedings and expenditures have been had and made in good faith in accordance with a definite, comprehensive and efficient plan or program for the economical development of hydro-electric power from the waters of the Cuyahoga River; that plaintiff's said development, on information and belief, will be of great public benefit, and will be worth upwards of six million dollars ($6,000,000) more than the actual cost of acquiring the lands and water rights and the building of the necessary structures.

XIV. That plaintiff's said improvements and water power, when developed and constructed and the flow of said river equalized in accordance with said development program, will yield at plaintiff's proposed power plant at the Village of Vaughn, not less than 20,827 electric horse-power for continuance service 10 hours daily, and will permit a net delivery of 52,560,000 (k. w.) Hrs. in nearby towns and cities, as follows: Ravenna, Kent, Cuyahoga Falls, Akron, Barberton, Massillon, Canton, Elyria, Lorain and Cleveland. Within a radius of 30 miles is a population of over 1,000,000 persons. Plaintiff says that there is a need and market for all the electric power thus capable of generation with said water power in either Cleveland or Akron at rates from one to three cents per kilowatt hour; that a net annual income of $395,300 may reasonably be expected to be realized from the operation of said power plant, if plaintiff's said development program be carried out without interference from the defendants.

XV. That the plans of development proposed by plaintiff conserve the possibilities of the Cuyahoga River and its tributaries, for purposes of hydro-electric power and domestic water supply to the greatest possible degree and are of vital and permanent importance to the cities, towns, manufacturers, electric light and railroad corporations and other industries located upon the watershed of said river, in the following manner:

(Reference is hereby made to conservation map No. 200, which is made a part hereof and marked "Exhibit C.")

(1) Abundant storage is secured by development of plaintiff to equalize the flow of the river to 300 second feet, providing two years of extreme drought succeed each other, by means of the use of a great natural reservoir site in Geauga County, with a storage capacity of Two and One Half Billion Cubic Feet. This region is sparsely populated, and the site for the dam for said reservoir is located upon natural rock foundation. Said reservoir is located twenty-five miles up stream from the Village of Kent, and all danger from the conconstruction of such a reservoir as is proposed by defendant is removed.

(2) The flow of said river is equalized in and through the Village of Kent in Portage County, doing away with flood damages and ren-

dering also an abandoned water power of value and of great public benefit to the said village.

(3) The flow of said river is equalized and maintained at 300 cubic second feet to the limits of the Village of Cuyahoga
21 Falls in Summit County, providing a constant, reliable supply for domestic use and drainage.

(4) The flow of said river is diverted in part at Gaylord Bridge Dam and stored in the Brandywine Basin, thereby lessening dangers of floods in the main channel of the river and frequent damage to railroad property and interruption of freight and passenger service.

(5) The flow of said river is equalized through its entire length in Cuyahoga County from Vaughn to Lake Erie, thereby largely reducing the damages from floods of over two hundred riparian owners in said portion of the river, including particularly the City of Cleveland. The annual cost of dredging and removing the accumulation of debris is stated by the engineers of said city to vary from 45 to 90 thousand dollars per annum.

(6) The equalization of the flow of said river in the navigable portion thereof and under the control of the U. S. Government, is an aid to the navigability thereof and of great benefit to the shipping interests dependent upon or using the harbor of said City of Cleveland.

(7) Plaintiff alleges that 700 owners are affected by its proposed development. That the fee to the lands is required from 153 or 16% of the whole.

That diversion rights are required from 96 or 14% of the whole.

That the right to equalize the flow is required from 480 owners or approximately 70% of the whole. A very large proportion of the property of the present owners is benefited by the proposed plans of plaintiff.

XVI. That the defendant, City of Akron, has not heretofore adopted any plan for supplying its inhabitants with water from the Cuyahoga River, nor save as hereinafter alleged, made any locations of properties and water rights on said river for such purpose;

That no plan for the use of the waters of the Cuyahoga
22 River for purposes of domestic supply were ever considered by defendant except those embodied in a certain report submitted by the Board of Control of the City of Akron to a meeting of Council held Aug. 28, 1911. That the only action taken by the defendant upon said Report was at a meeting held Sept. 6, 1911, the minutes of which meeting are as follows:

"Upon motion, the report of the Board of Control transmitting to the city council the Report of the engineers F. A. Barbour and E. G. Bradbury on an improved water supply for the City of Akron, was unanimously accepted."

That the said Report of said engineers was not adopted at said meeting and has never been so adopted at any subsequent meeting of council of the said City of Akron.

That the said Report of said engineers presents various plans and sources from which defendant may secure a new source of supply or continue to use the present source.

That the said Report of said engineers fixes the amount of money required from defendant at over $3,000,000.00, if the Cuyahoga River is adopted as a source of supply. Defendant was without funds or authority, on the date when said Report was submitted, and has been from such date until the present, and now is, to incur an obligation of said amount.

That defendant was at said date and has been since said date and now is up to or in excess of the debt limit permitted by law.

Plaintiff further alleges that when defendant undertook to provide funds required for municipal water supply and other purposes in excess of the limit of taxation permitted by law by a submission of the question to a popular vote, said increase was refused as hereinafter more particularly set forth, in paragraph XXXI.

XVII. That Section 3677 of the General Code of Ohio,
23 paragraph 13, provides in part as follows:

"For providing for a supply of water for itself and its inhabitants by the construction of wells, pumps, cisterns, aqueducts, water pipes, dams, reservoirs, reservoir sites and water works, and for the protection thereof, and to provide for a supply of water for itself and its inhabitants, any municipal corporation may appropriate property within or without the limits of the corporation; and for this purpose any such municipal corporation may appropriate in the manner provided in this chapter, any property or right or interest therein, theretofore acquired by any private corporation for any purpose by appropriation, proceedings or otherwise."

That Section 3679 of the General Code of Ohio is in part as follows:

"For water-works purposes and for purposes of creating reservoirs to provide for a supply of water, the Council may appropriate such property as it may determine to be necessary."

That on the 27th day of May, 1912, the Council of said City purported to pass a Resolution known as Resolution No. 3241.

Said Resolution is as follows:

"Resolution No. 3241, Declaring Intention to Appropriate Property for Water-supply Purposes.

Be it resolved by the Council of the City of Akron, State of Ohio, three-fourths of all the members elected thereto concurring, by reason of this resolution being an emergency measure;

SECTION 1. That, by virtue and in exercise of the power and authority contained in House Bill No. 357 of the Ohio Legislature, contained in Vol. 102 of the Ohio Laws, page 175, passed by the legislature of the State of Ohio, May 7, 1911, and in partial execution thereof, and by virtue and in exercise of every other power and authority thereto enabling, it hereby declares its intention to
24 appropriate, for the purpose of supplying water to said City of Akron and the inhabitants thereof, the following described property, and any and all rights or interest therein, to wit: All the waters of the Cuyahoga River at and above a line heretofore fixed as the axis of a proposed dam to be built by said city in the Town-

ship of Franklin, County of Portage, and State aforesaid; said line of proposed appropriation being approximately twelve hundred (1200) feet northeast from the point where the Cleveland & Pittsburg Division of the Pennsylvania Railroad now crosses said Cuyahoga River, and being shown upon a plan dated June, 1911, prepared by Frank A. Barbour and Edward G. Bradbury, and bearing the inscription, "City of Akron Improvement of Water Supply; plan showing development of Cuyahoga River; sheet 9"; and also all the waters of all the tributaries of said Cuyahoga River above said line of proposed appropriation, and all the waters which may flow into and from said Cuyahoga River, and the tributaries thereof, above said line, for the purpose of diverting the same, for the purpose aforesaid, at or near said line and not elsewhere.

SECTION 2. This resolution is declared to be an emergency measure.

SECTION 3. This resolution shall take effect from and after the earliest period allowed by law."

XVIII. That thereafter, to wit, on said 26th day of August, 1912, the City Council of the City of Akron passed an ordinance known as Ordinance 3396, purporting thereby to appropriate to its use for the purpose of supplying water to the City of Akron and its inhabitants, all of the waters of the Cuyahoga River as described in said Resolution Number 3241 as hereinabove alleged. Said ordinance is as follows:

Ordinance No. 3396—To Appropriate Property for Water Supply Purposes.

Be it ordained by the Council of the City of Akron, State of Ohio, two-thirds of all members elected thereto concurring:

SECTION 1. That by virtue and in exercise of the power and authority contained in House Bill No. 357 of the Ohio Legislature contained in Vol. 102 of the Ohio Laws, page 175, passed by the Legislature of the State of Ohio, May 17, 1911, and in partial execution thereof, and by virtue and in exercise of every other power and authority thereto enabling the following described property and any and all rights or interest therein, be and the same is hereby appropriated to public use *of* the purpose of supplying water to said City of Akron and the inhabitants thereof, to wit: All the waters of the Cuyahoga River at and above a line heretofore fixed as the axis of a proposed dam to be built by said city, in the Township of Franklin, County of Portage and State aforesaid; said line of appropriation being approximately twelve hundred (1200) feet northeast from the point where the Cleveland & Pittsburg Division of the Pennsylvania Railroad now crosses said Cuyahoga River, and being shown upon a plan dated June, 1911, prepared by Frank A. Barbour and Edward G. Bradbury and bearing the inscription "City of Akron Improvement of Water Supply Plan Showing Development of Cuyahoga River, Sheet 9"; and also all the waters of all the tributaries of said Cuyahoga River, above said line of appropriation, and all

the waters which may flow into and from Cuyahoga River and the tributaries thereof above said line, for the purpose of diverting the same for the purpose aforesaid, at or near said line, and not elsewhere.

SECTION 2. That the solicitor be and is hereby authorized and directed to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for such property.

26 SECTION 3. That the costs and expenses of said appropriation be paid out of the proceeds of the sale of bonds issued under authority of an ordinance entitled "Ordinance 3233, to issue bonds for the purpose of extending, enlarging, improving, repairing and securing a more complete enjoyment of the water works of the City of Akron, Ohio, and for the purpose of supplying water to said city and the inhabitants thereof," passed May 27, 1912.

SECTION 4. That this ordinance shall take effect and be in force from and after the earliest period allowed by law."

XIX. Plaintiff alleges that the intent, purpose and effect of said statutes of the State of Ohio and Resolution No. 3241 and Ordinance No. 3396 of defendant, are, to appropriate and destroy without compensation the rights secured to plaintiff through and by virtue of the charter granted it by the State of Ohio and the due acceptance thereof by plaintiff and the several amendments thereto, and so said statutes resolution and ordinance are in violation of Article I, Section 10 of the Constitution of the United States, guaranteeing to plaintiff that no State shall pass any law impairing the obligation of contracts.

And plaintiff further alleges that under color of said statutes, resolution and ordinance defendant also threatens to and has appropriated, without compensation, the property of plaintiff, secured to it by virtue of its prior location upon the Cuyahoga River and its tributaries, and so defendant has violated the Fourteenth Amendment of the Constitution of the United States in that it threatens to and has appropriated the property of plaintiff without due process of law, and denies to plaintiff the equal protection of the law.

Said defendant further pretends under said statutes, resolution and ordinance, to take all the property of plaintiff, upon its
27 own determination of the necessity therefor, without a judicial hearing or determination as to said necessity, in contravention of the rights of plaintiff as guaranteed to it by Art. I, Sec. 10 of the Constitution of the United States forbidding the enactment by the States of any law impairing the obligation of contracts; and also in contravention of the rights guaranteed to plaintiff by the 14th amendment to the Constitution of the United States securing to plaintiff the equal protection of the laws, and that its property shall not be taken without due process of law.

XX. That the defendant has let contracts for and commenced construction of, and unless restrained, purposes to continue such construction work in and about the erection of a reservoir in the bed of said River above the Village of Kent, and to take such steps to divert the River's water at said point, as will permanently interfere

with and ultimately destroy the value of the property rights, franchises and privileges of plaintiff, in and to the waters of said River acquired by its said prior locations and proceedings, and will completely destroy and make futile plaintiff's entire corporate purpose.

That on the 18th day of March, 1913, defendant advertised for bids for the construction of a dam in the Cuyahoga River as follows:

Notice to Bidders.

City of Akron, O.—Department of Public Service.—Improvement of Water Works.

Sealed proposals for the construction of the Cuyahoga River dam will be received by the Director of Public Service, Akron, O., until 12 o'clock noon, April 8, 1913.

The contract includes about 9,230 cubic yards of concrete with the necessary excavation, steel reinforcement and other contingent work.

A bond or certified check for $10,000 must accompany
28 each bid. A bond for $75,000 will be required of the successful bidder.

Plans and specifications can be seen at the office of the undersigned.

The right is reserved to reject any or all bids.

R. M. PILLMORE,
Director of Public Service.

XXI. That defendant on the 22nd day of April, 1913, and without notice to plaintiff and by collusion with the Falls Heat, Light & Power Company, a corporation, the Walsh Paper Company, a corporation, Cornelius M. Walsh and Jane J. Walsh, wife of said Cornelius M. Walsh, brought a pretended condemnation proceeding against the property owned by the said Falls Heat, Light & Power Company, a corporation, the Walsh Paper Company, a corporation, Cornelius M. Walsh and Jane J. Walsh, wife of said Cornelius M. Walsh, being the same property covered by the locations and surveys referred to herein in paragraph V as belonging to C. M. Walsh, Parcels 1 and 2, and the Walsh Paper Co.

At the time said pretended condemnation proceeding was brought by defendant the said property was also subject to a prior condemnation proceeding by plaintiff which had been filed in the Probate Court of Summit County on the 9th day of April, 1913, and is designated upon the docket thereof as No. 4610.

That in due course plaintiff served notice upon defendant as follows:

"It has been called to the attention of the undersigned corporation that the City of Akron advertised for bids to be received on April 8, 1913, for contracts for the erection of a dam and construction of a reservoir, to carry out some scheme or plan, as mentioned in
29 such advertisements, for the diversion, at or near Kent, of the water of Cuyahoga River for water supply for the City of Akron and its inhabitants.

This corporation, in its letter to you, dated March 29, 1913, has fully outlined the purposes and powers of the corporation, and a repetition in this letter is unnecessary. You and each of you are hereby notified that any diversion of the water of Cuyahoga River, at or about Kent, by the City of Akron, will necessarily invade the exclusive rights which this company now has in and to the waters of the Cuyahoga River, and that this corporation stands on its rights.

THE CUYAHOGA RIVER POWER COMPANY,
By W. R. KIMBALL, *President.*

Attest:
LOUIS ENGLANDER, *Secretary.*

(Sent by registered mail.)
Cleveland, April 10, 1913."

That plaintiff has attempted to purchase from defendant the rights necessary for its corporate purposes, to equalize the flow of the Cuyahoga River as appurtenant to lands owned by defendant in Portage County, and said defendant has refused to make such sale, although the equalization of the flow of said river as appurtenant to said lands was a benefit to defendants, and upon information and belief that such refusal was for the purpose of hindering and destroying the development of plaintiff upon said Cuyahoga River.

XXII. Plaintiff alleges that the intent, purpose and effect of said acts and proceedings of defendant are to appropriate and destroy without compensation the rights secured to plaintiff through and by virtue of the charter granted it by the State of Ohio and the due acceptance thereof by plaintiff, and the several amendments thereto, and so said acts and proceedings taken under color of the aforesaid statutes, resolution and ordinance are in violation of Article I, Section 10, of the Constitution of the United States guaranteeing to plaintiff that no State shall pass any law impairing the obligation of contracts.

And plaintiff further alleges that by said acts and proceedings taken under color of said statutes, resolution and ordinance, defendant also threatens to and has appropriated, without compensation, the property of plaintiff secured to it by virtue of its prior location upon the Cuyahoga River and its tributaries, and so defendant has violated the Fourteenth Amendment of the Constitution of the United States in that it threatens to and has appropriated the property of plaintiff without due process of law and denies to plaintiff the equal protection of the law.

XXIII. That the appropriation made, proposed and threatened, of all of the said waters of the Cuyahoga River as described in said last mentioned Resolution and Ordinance, if unrestrained by this Court, will utterly destroy the said development program of plaintiff and the value of the several improvements proposed to be constructed by the plaintiff, in accordance with said program, and will utterly destroy its said exclusive franchise and rights in said river; that plaintiff will be forever prevented from carrying into effect the purposes and objects authorized by its articles of incorporation; and the

large sums of money thus far expended by plaintiff towards the consummation of its said development program and in the perfection of its property rights under its said location will be lost, and plaintiff will be cut off forever from exercising and enjoying its franchises and from utilizing and developing the water power of said river under its said development program, and from receiving the profits and gains which it might reasonably be expected to earn;
31 that the actual loss in money and damages to plaintiff cannot be accurately estimated and determined and plaintiff will suffer irreparable damage.

XXIV. That the defendant purposes and threatens to appropriate the aforesaid waters of the Cuyahoga River for the pretended purpose of supplying itself and its inhabitants with a municipal supply of water; but that the defendant is not situated on the Cuyahoga River, nor on any of its tributaries except the Little Cuyahoga River; that the Cuyahoga River has its source in the County of Geauga, in the State of Ohio, and thence flows in a general southwesterly direction through the Village of Kent, in the County of Portage, and into the County of Summit, and through the Village of Cuyahoga Falls, then turns abruptly and flows westerly for a short distance, then northerly and continues northerly or northwesterly through the Counties of Summit and Cuyahoga, and through the City of Cleveland and empties into Lake Erie; that in and through the City of Cleveland, said River is and always has been navigable; that through the Counties of Summit, Portage and Geauga, it is not navigable; that the Cuyahoga River does not approach the City of Akron nearer than about one mile, and the point at which it approaches the City of Akron is far below the lowest point at which this plaintiff contemplates making any of its improvements aforesaid.

XXV. That defendant has no need to use the waters of the Cuyahoga River for any purpose whatever, that the defendant is situated on the Little Cuyahoga River, a tributary of the Cuyahoga River aforesaid; that said Little Cuyahoga River has its sources in Springfield Lake in said County of Summit and in Fritch's Lake in the County of Portage, and it flows from the sources aforesaid in a general westerly direction through the City of Akron and discharges its waters into the Cuyahoga River about two miles below the lower dam contemplated and provided for by the plain-
32 tiff; that the plaintiff does not propose making any use of the waters of the Little Cuyahoga River in the plans it has adopted, but it says that the waters of the Little Cuyahoga River are available to the City of Akron, as a riparian owner, for the purposes of a municipal supply of water and are likewise adapted for that purpose; that the watershed of said Little Cuyahoga River is of sufficient area if properly developed with suitable storage reservoirs to furnish the entire supply of water needed by and for the City of Akron at this time and for many years in the future so far as those needs can now be anticipated.

XXVI. That the defendant is also situated and located upon the watershed of the Tuscarawas River; and that Summit Lake, so-

called, which is drained by the Tuscarawas River, is located within the municipal boundaries of the defendant city; that the Tuscarawas River has its sources in the southern portions of Summit County and the northern townships of Stark County and that its source through the County of Summit lies generally a few miles southerly of the City of Akron; that in addition to Summit Lake, aforesaid, long Lake, Turkeyfoot Lake and the Portage or Tuscarawas Reservoirs, so-called, are also connected with and on the watershed of the Tuscarawas River and drained by that stream; that said lakes, aforesaid, have a combined area of not less than 32,000 acre feet and are sufficient with the watershed on which they are located, if properly developed, to furnish an abundant and adequate supply of water for the City of Akron and its inhabitants, not only for the present but also for all its reasonable future uses and requirements so far as those can be ascertained or reasonably anticipated. That defendant for many years last past has secured and now secures its entire municipal supply of water for itself and its inhabitants from said Summit Lake, taking and drawing therefrom an aver-
33 age of six million gallons of water per day; that the watershed of the Tuscarawas River easterly of the lakes and reservoirs aforesaid if suitably developed, would, without said lakes and reservoirs, furnish a sufficient and abundant supply of water for said city and its inhabitants not only for the present but for all reasonable requirements in the future so far as those requirements can be anticipated; that said lakes and reservoirs and the watershed of the Tuscarawas River and the watershed of the Little Cuyahoga River aforesaid, are the natural, logical and reasonable sources of supply for a municipal supply of water for said city and are moreover fully available to it, and that the Cuyahoga River, at the point from which the defendant under the terms of said resolution and ordinance proposes to take and appropriate the waters of the Cuyahoga River is not a natural and reasonable source for a municipal supply of water for said defendant; but the point from which the defendant proposes to take the water of said Cuyahoga River is situate some twenty miles from the limits of said city and the water therefrom can only be brought to said city by diverting the same from its natural course and channel and not otherwise.

XXVII. That until on or about the 22d day of March, 1912, The Akron Water Works Company, a private corporation, owned and operated a system of water works for the purpose of supplying the City of Akron and its inhabitants with a supply of water; that the water furnished by said The Akron Water Works Company to the City of Akron and its inhabitants, was derived from said Summit Lake so located as aforesaid on the watershed of the Tuscarawas River and within the corporate limits of the City of Akron. That on or about the 22d day of March, 1912, the defendant acquired by purchase from said The Akron Water Works Company at a cost of over $840,000.00 its entire water supply, plant and system,
34 consisting of pipe lines of every sort and nature and all appurtenances connected ther-with wherever located in and about the City of Akron and County of Summit; together with all

machinery, tools, fixtures and appurtenances connected with and belonging to said The Akron Water Works Company, including all meters, gauges, registering instruments and all franchises, easements, rights and privileges connected with or owned and enjoyed by said The Akron Water Works Company, and all other property of every sort of said The Akron Water Works Company. That since said 22d day of March, 1912, the defendant as the owner of said Akron Water Works system has been operating the same in the City of Akron and supplying the said City and its inhabitants with a supply of water derived from said Summit Lake aforesaid.

XXVIII. That the defendant wholly disregarding and ignoring the plaintiff's rights in the premises, and in violation and derogation thereof, purposes and threatens to erect and maintain a reservoir on the Cuyahoga River, in the County of Portage, at the place specified in the aforesaid resolution of May 27, 1912, and ordinance of August 26, 1913, and to divert at said point on the river all the water thereof, and carry the water so diverted by means of artificial conduits or channels into the City of Akron; that defendant does not intend to and cannot devote all the water of the Cuyahoga River to a public use, as it pretends to do by Resolution No. 3241 and Ordinance No. 3396 hereinbefore referred to. That in so far as defendant takes the waters of any stream by proceedings in eminent domain, except for the purposes of domestic water supply it is taking private property for some other use than a public use, and such taking is done under the color of the authority of the acts of the Legislature in Ohio known as Section 3677, par. 13, and Section 3679, General Code of Ohio. That the average daily consumption of defendant of water for domestic purposes for the year 1910 was approximately 7,340,000 gallons.

That upon information and belief the estimated future population of Akron will be as follows:

Year.	Population.	Year.	Population.
1915.....	86,000	1935.....	173,000
1920.....	105,000	1940.....	200,000
1925.....	125,000	1945.....	229,000
1930.....	148,000	1950.....	260,000

That upon the above estimate as to probable growth of the said defendant city, and according to commonly accepted opinions as to use, the average daily consumption by the defendant city during the next 37 years will be as follows:

Year.	Gallons per day.
1915.....	8,600,000
1920.....	10,500,000
1925.....	12,500,000
1930.....	14,800,000
1935.....	17,300,000
1940.....	20,000,000
1945.....	22,900,000
1950.....	26,000,000

Plaintiff alleges that an appropriation by defendant of more than 20,000,000 of gallons per day is unreasonable and arbitrary and not for a public use; that the available flow of the Cuyahoga River is, under plans of plaintiff, over 200,000,000 gallons per day, and, therefore, that pursuant to Resolution No. 3241 and Ordinance No. 3396 hereinbefore set forth, defendant proposes to appropriate for some other than a public use or else for no use whatever, over 180,000,000 gallons of water per day, which has been devoted to a prior and paramount public use by plaintiff, such appropriation being in violation of the fundamental principle of free
36 government that no private property shall be taken under power of eminent domain, except for a public use, and that property which has been devoted to a public use shall not be taken for an inferior or private use.

XXIX. That defendant is without right or power to divert the waters of the Cuyahoga River hereinbefore set forth in that said defendant is not located in and upon said Cuyahoga River and has no rights as a riparian owner on said river, except for the riparian use of its riparian lands, and said defendant has no right or power to divert any of the water of said river to the City of Akron for sale or otherwise.

That said Cuyahoga River has been for a time to which the memory of man runneth not to the contrary and now is, navigable, in a substantial proportion thereof, and is now used for purposes of navigation; that the threatened acts of defendant herein, if consummated, will interfere with the navigability of said river contrary to statutes and laws of the United States in such cases made and provided.

XXX. That by virtue of its proceedings as hereinbefore set forth, plaintiff has acquired the exclusive franchise to utilize the said river and its waters for a public use, that is to say, the exclusive right to lay out and construct its said improvements in the manner provided for by its said development program and to generate and sell electricity and that said franchise is a prior, better and superior right to any rights which the defendant has or can acquire in the waters of the Cuyahoga River within the boundaries of plaintiff's said locations on said River; that plaintiff's said franchise and right constitute a valuable asset and property and will be totally destroyed and rendered useless, unless defendant is restrained by this Court as herein prayed.

XXXI. That the defendant has failed and refuses to compensate plaintiff *or* its properties, rights and privileges about to
37 be taken by defendant; that it has made no provision, and on information and belief is now without power and authority to make any provision to compensate plaintiff for such taking and appropriation; that it is doubtful and uncertain whether the requisite power and authority to compensate plaintiff can be obtained by defendant; that a special vote of a majority of the qualified electors of defendant is essential to confer upon defendant the requisite power to raise the amount necessary to compensate plaintiff and to authorize the payment of such amount to plaintiff *is* raised, and

until an increase in the tax is authorized by said electors, no provision to compensate plaintiff can be made by defendant; that on the first day of November, 1912, at an election regularly held, the question of increasing the said tax rate was duly submitted to said electors and said increase was refused and no increase has since been authorized.

The Mayor and Auditor of defendant, on or about Nov. 1st, 1912, issued a statement to the public that if said increase was not voted defendant could not meet its obligations. Copy of said statement is hereto attached for reference, and made a part hereof and marked "Exhibit D."

XXXII. That defendant's acts and proceedings herein already had and threatened have already caused and will continue to cause plaintiff irreparable damage, and have cast a cloud upon the franchises, rights and title of plaintiff in said River.

XXXIII. That the defendant is and at all times has been fully informed as to the rights of the plaintiff in the premises and is fully informed of plaintiff's priority of location on said river; yet notwithstanding, defendant w ngfully and unlawfully seeks to ignore and destroy plaintiff's property rights and franchises
38 in the premises and the value of its priority of said locations, and defendant plans and schemes to acquire property and rights in said river from certain riparian owners with the intent of defeating plaintiff's said franchises and priority of right, all to plaintiff's irreparable damage.

XXXIV. That all and each of the acts of defendant herein as above set forth, and each and singular, is in violation of the rights of plaintiff under the Constitution and laws of the United States and contrary to Section 10 of Article I, providing that no State shall pass any law impairing the obligation of contracts, and also of the Fourteenth Amendment of said Constitution guaranteeing the equal protection of the laws and that private property shall not be taken without due process of law.

XXXV. That plaintiff has no adequate remedy at law.

Wherefore the plaintiff prays that the defendant, the City of Akron and its officers and agents be perpetually enjoined and restrained from constructing any dam or reservoir on the Cuyahoga River in the township of Franklin, County of Portage and State of Ohio; that it be enjoined and restrained from appropriating all or any of the waters of the Cuyahoga River at and above the line fixed as the axis of said proposed dam in the township of Franklin, County of Portage and State of Ohio, said line of proposed appropriation being approximately 1,200 feet northeast of the point where the Cleveland and Pittsburgh division of the Pennsylvania Railroad now crosses the Cuyahoga River and as particularly shown on a plan dated June, 1911, prepared by Frank H. Barber and Edward T. Bradbury; that the defendant be enjoined and restrained from appropriating to its use any of the waters of the tributaries of the Cuyahoga River at and above said proposed dam; that said defendant be further enjoined and restrained from diverting either perma-
39 nently or temporarily any of the water of the Cuyahoga River for the purpose of conveying the same to the City of Akron

and that it be perpetually enjoined and restrained from diverting any of the water of said river out of said proposed reservoir for any purpose whatever.

And plaintiff further prays that during the pendency of this suit, a restraining order may be allowed temporarily restraining the defendant and its agents and officers from constructing and maintaining any dam or reservoir on the Cuyahoga River and across the Cuyahoga River in the township of Franklin, County of Summit and State of Ohio, and particularly a proposed dam and reservoir shown on the plans of Frank J. Barber and Edward T. Bradbury, dated June, 1911, and located about 1,200 feet northeast of the point where the Cleveland and Pittsburg Railroad now crosses the Cuyahoga River in said township of Franklin; that said City, its officers and agents be further temporarily restrained from appropriating any of the waters of the Cuyahoga River at and above the site of the said proposed dam and that said defendant, its agents and officers be temporarily enjoined and restrained from diverting any of the water of the Cuyahoga River or of any of its tributaries from and out of the natural channel of said river and out of said proposed dam for the purpose of permanently diverting the same from said river or for the purpose of carying the same to the City of Akron.

Plaintiff prays further for other and additional relief in the premises as the facts of the case may show it is entitled to obtain in this cause.

XXXVI. Plaintiff further prays that your Honors grant unto plaintiff a writ of subpœna ad respondendum issuing out of and under the seal of this Honorable Court, to be directed to the said defendants, commanding them and each of them, on a certain day and under a certain penalty, to be therein inserted, to appear before your Honors in this Honorable Court and then and there fully, true, direct and perfect answer make to all and singular the premises, and further to stand, do, perform and abide by such further order and decree as to your Honors may seem meet; and also that a writ of provisional injunction to the purport, tenor and effect, as hereinbefore set forth and appears, be granted during the pendency of this action.

And plaintiff will ever pray, etc.

THE CUYAHOGA RIVER POWER CO.,
By WILLARD R. KIMBALL, *President.*
FRANK & REAM,
CHAPMAN, HOWLAND & NIMAN,
Solicitors for Plaintiff.

MESSRS. DAVIES, AUERBACH & CORNELL,
32 *Nassau Street, Borough of Manhattan, New York;*
MESSRS. COLLIN, WELLS & HUGHES,
5 *Nassau Street, Borough of Manhattan, New York;*
MESSRS. ENSLOW, FITZPATRICK, ALDERSON & BAKER,
Huntington, West Virginia,
Of Counsel for Plaintiff.

MAPS

TOO

LARGE

FOR

FILMING

UNITED STATES OF AMERICA,
Southern District of New York,
County of New York:

Willard R. Kimball, being duly sworn, says that he is the President of the Cuyahoga River Power Company of Ohio, the plaintiff named in the foregoing bill of complaint, and who has subscribed the same; and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters, he believes it to be true.

WILLARD R. KIMBALL.

41 Sworn to before me this 9th day of July 1913.
[SEAL.] JESSIE MACLARDY,
Notary Public, Queens County.

Certificate filed in New York County, No. 44.

(Here follow maps, etc., marked pages 42 to 46.)

47 (EXHIBIT "D.")

"Realizing that people who do not take the trouble to investigate, are likely to reach erroneous conclusions regarding the question to be submitted to the vote of the people at the November election, asking for an additional levy of two mills, and desiring the matter put before them in a way to represent the tru- condition we beg to submit the following

Statement

"Showing the Expenditures of City Government in the Year- 1909, 1910, and 1911, Partly Estimated Amount for 1912, and Amount Estimated Necessary for 1913, as Shown by the Budget Passed by the City Council.

Total Expenditures.

1909	$489,323.71
1910	553,714.75
1911	602,105.15
1912 partly estimated	687,849.00
1913 estimated amount necessary	823,790.00

Expenditures Exclusive of Sinking Fund.

1909	$328,066.15
1910	373,766.74
1911	435,437.63
1912 partly estimate-	462,294.00
1913 estimated amount necessary	515,740.00

Yearly Increase in Expenditures Other than Sinking Fund.

1910 over 1909	$45,700.59
1911 over 1910	61,670.89
1912 over 1911 partly estimated	26,856.37
1913 over 1912 estimated amount needed	53,446.00

It will be seen from the above that there has been a gradual increas- in the amount of expenditures exclusive of the Sinking Fund in each of the years covered by this statement. In 1911 the increase was more than for the other years, and is accounted for by the fact that there was an increase in the salaries of police and firemen, and the balance of it is to be accounted for by the unusual growth
48 of the city. The *The* following statement will show the amount collected for taxes:

Total including Sinking Fund, 1909, $432,839.47; Sinking Fund, $131,659.00; net for general purposes, $301,180.47.

Total including Sinking Fund, 1910, $390,015.56; Sinking Fund, $135,422.00; net for general purposes, $264,593.56.

Total including Sinking Fund, 1911, $428,586.68; Sinking Fund, $95,341.00; net for general purposes, $333,345.68.

Total including Sinking Fund, 1912, $435,807.64; Sinking Fund, $200,774.27; net for general purposes, $235,033.37.

It will be seen from this statement that the city received from the collection of taxes for purposes other than the Sinking Fund for the current year a smaller amount than for any of the other years. The difference between the amount expended and that shown as received from taxes is accounted for by the fact that the city has other resources of revenue. Dow taxes, licenses, fines, building permits, etc.

The budget for 1913 shows that it is necessary to raise by taxation for general purposes, $369,921.00; for sinking fund purposes, $308,050.00; total, $677,971.00.

"The amount which it will be possible to collect from taxation is estimated at $495,860.00, leaving a shortage of $182,111.00. The amount required by the Sinking Fund Commission cannot be reduced, and ought not to be reduced because it is to provide for the financial obligations of the city, which would either have to be refunded or go to protest if the means are not provided for paying them. Deducting what the Sinking Fund requires from the total amount that may be collected, leaves $187,810.00 that we may realize for general purposes or only one-half the amount necessary.

"The situation is therefore, that if the election does not
49 carry, the city will become bankrupt, and business will have to suspended, or police force, fire department, and other departments reduced in efficiency.

"Akron has 176 miles of street, 88 miles of which are paved. There are numerous sewers, both of which are a source of constant expense. The Service Department has never had the money to keep them in repair as the people desire them to be kept, and economy will have to be practised if this additional levy is granted, but if granted, it is hoped that it will put the department in shape to do at least as well, if not better than it has done in the past.

"Many streets are in bad condition. Repairs are made to the extent that the means provided will allow. It has been impossible to make all the repairs when needed, nor could it be done unless money is provided. We also call attention to the fact that the Sinking Fund Commission required $103,000.00 more for 1913 than was required for 1912; that there has been bonds issued to the amount of $2,000,000.00 for improved water works, the interest on which must be paid. It is estimated that the revenue from the water works, with the present facilities, will take care of about one-half of this interest, and provide a Sinking Fund, but the balance must be provided for by taxation.

Respectfully submitted,

FRANK W. ROCKWELL, *Mayor.*
JAMES McCVAUSLAND,
City Auditor.

50 (*Motion to Dismiss. Filed Aug.* 4, 1913.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 192. Equity.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
vs.
THE CITY OF AKRON, a Municipal Corporation, Defendant.

Motion to Dismiss.

And comes the defendant and moves the Court to dismiss the Bill of Complaint herein, for the following reasons:

1. The Court has not jurisdiction of the subject matter, for there is no violation of the Federal Constitution shown.

House Bill No. 357 of the Ohio Legislature, contained in Volume 102 Ohio Laws, page 175, which purports to grant to the City of Akron certain rights in the Cuyahoga River, neither violates Section 10 of Article 1, nor the Fourteenth Amendment of the Federal Constitution. If, prior to the passage of this act, the State of Ohio owned the rights in the Cuyahoga River, then the plaintiff did not, and the State had a right to grant them to this defendant, and such grant violates no part of the Constitution; if on the other hand the State had no right to the waters of the Cuyahoga River at the time of the passage of said act, then it granted nothing to this defendant in said act, and having nothing to grant and granting nothing, the act was absolutely ineffective for any purpose and so could not violate any clause of the Federal Constitution.

The several Resolutions and Ordinances set forth in the Bill of Complaint, as having been passed by the Council of the Defendant, the City of Akron, do not violate any clause of the Federal
51 Constitution; they do not violate Section 10 of Article 1 as impairing the obligation of contracts, because they are not laws within the meaning of that clause of the Consti-tion, but are compacts among the corporators; they do not violate the Fourteenth Amendment of the Consti-tion because they do not take property, and the City of Akron could not take property except in pursuance of and after verdict of a jury, judgment of a Court and the actual payment of the money; then and not until then, is the property taken, under Section 19 of Article 1 of the Ohio Constitution.

2. The facts in the Bill are insufficient to sustain a valid cause of action in Equity. The City of Akron is a municipal corporation, and it does not appear that the plaintiff is a citizen of the said City, or is a tax payer therein; nor does it appear that it brings this suit as a tax payer. It, therefore, cannot complain as to the internal affairs of this defendant, as to whether or not it has exceeded its statutory authority or whether it has abused its corporate powers

These questions can only be raised by a member of the corporation and not by an outsider.

If it be a matter which properly affect the public generally, that is complained of here, then the Attorney General of the State is the proper one to bring bill in equity to prevent a municipal corporation from exceeding its lawful authority or from abusing its corporate powers; but it does not appear from the bill that the acts complained of affect the public generally.

The Bill does not set forth any recognized grounds of chancery jurisdiction. If the proceedings of the municipal Council are without statutory authority then the municipality acquired no rights under them, and they do not cast a cloud upon the title of the property of the plaintiff if any they have; and the plaintiff must
52 resort to the ordinary legal remedies. Their remedy is not by Bill in Equity. If the proceedings of the municipal Council, which are complained of in the Bill, were without authority of law, the defendant cannot acquire any title to any property under them, but if it attempted to take possession of any property under them, or if it did take possession of any property under them, the remedy of the rightful owner would be an action at law to recover possession, and not by Bill in Equity. Therefore, we see that the plaintiff has his adequate remedy at law.

With respect to proceedings of inferior tribunals of special powers or jurisdiction, Courts of Equity do not interfere, unless it becomes necessary to prevent a multiplicity of suits, or irreparable injury, or unless the proceedings sought to be annulled be valid on its face, and the invalidity consists of matter to be established by extrinsic evidence. This cause does not come within the rule of any of these. Manifestly the bill is not to prevent a multiplicity of suits, nor will the plaintiff be irreparably injured, for if it has any property the City of Akron cannot take it without paying for it under the Constitution of Ohio. Nor does the alleged invalidity of the cause of the City of Akron consist of matters to be established by extrinsic evidence, for the bill of complaint is so very full that nothing remains to be said as to the facts.

JONATHAN TAYLOR,
Attorney for the City of Akron.

53 (*Amended Motion to Dismiss. Filed Sept. 10th, 1913.*)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 192. Equity.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
vs.
THE CITY OF AKRON, a Municipal Corporation, Defendant.

Amended Motion to Dismiss.

Now comes City of Akron, the defendant in the above entitled cause and moves that the plaintiff's bill of complaint be dismissed and for causes therefor sets forth the following:

1. Because it does not appear in the allegations contained in the plaintiff's bill of complaint that this court has jurisdiction of this cause.

2. Because the plaintiff's bill of complaint does not set forth fully any statute claimed to be in violation of the Constitution and laws of the United States or any cause arising under said Constitution and laws.

3. Because it does not appear in the plaintiff's bill of complaint that said cause arises under the Constitution and laws of the United States.

4. Because the bill of complaint states no cause of action entitling the plaintiff to relief in equity.

5. Because it does not appear from the plaintiff's bill of complaint that the plaintiff has any interest in the subject matter thereof.

6. Because it does not appear from the plaintiff's bill of complaint that the plaintiff has any interest in the subject matter
54 thereof affected by any acts committed or threatened by the defendant.

7. Because it appears from the allegations of the plaintiff's bill of complaint that the defendant has neither committed nor threatened any acts in violation of any rights of the plaintiff.

8. Because it appears from the allegations in the plaintiff's bill of complaint that the plaintiff has a full, complete and adequate remedy at law.

9. Because it appears from the allegations of the plaintiff's bill of complaint that the plaintiff has been guilty of laches in the premises.

THE CITY OF AKRON,
By JONATHAN TAYLOR,
Solicitor.

54½ (*Notice of Motion. Filed Sept.* 22, 1913.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 192. Equity.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
vs.
THE CITY OF AKRON, a Municipal Corporation, Defendant.

The defendant, the City of Akron, in the above entitled cause, will take notice that on and after five days from the date of the service of this notice, the plaintiff will ask the court to set down for hearing the motion of the defendant herein to dismiss the Bill of Complaint in the above entitled cause.

CHAPMAN, HOWLAND & NIMAN,
Attorneys for Plaintiff.

Service of the above notice is hereby accepted as and of the date below written by the defendant, the City of Akron.

JONATHAN TAYLOR,
Solicitor for the City of Akron.

September 9th, 1913.

55 (*Memorandum Opinion. Filed Nov.* 25, 1913.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 192. Equity.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
vs.
THE CITY OF AKRON, a Municipal Corporation, Defendant.

Memorandum Opinion.

DAY, *District Judge:*

A motion to dismiss the bill of complaint of the plaintiff has been filed by the defendant. This is a bill in equity brought by the plaintiff, a private corporation organized under the laws of Ohio, against the City of Akron, a municipal corporation of Ohio, seeking to have the defendant enjoined from constructing a dam upon the Cuyahoga River and from appropriating or diverting the waters of that river. No interlocutory order has been asked for by the complainant. The aid of this court is invoked upon the ground that this suit arises under the constitution and laws of the United States.

The bill alleges the incorporation of the plaintiff, its purposes and various acts and proceedings which it has done and instituted.

The purposes are briefly, to develop hydro-electric power on the Cuyahoga River and to dispose of the same to various customers; and the acts and proceedings are the procuring and adoption of plans and surveys, the passing of certain votes, the determination to proceed with the construction of dams and reservoirs, the adoption of descriptions and development programs and the com-
56 mencement of proceedings in certain courts of Ohio to acquire certain rights on the river. It is alleged that in procuring the plans and surveys the plaintiff has been put to great expense and has caused some of its securities to be sold; that by virtue of its organization and the various proceedings recited, the plaintiff has acquired a prior right and franchise to appropriate the necessary lands and waters and is substituted to the rights of certain riparian owners on the river "absolutely as to third parties and conditionally as to then holders of title." The bill then sets forth a portion of Section 3677 of the General Code of Ohio, paragraph 13, providing:

"For providing for a supply of water for itself and its inhabitants by the construction of wells, pumps, cisterns, aqueducts, water pipes, dams, reservoirs, reservoir sites and water works, and for the protection thereof, and to provide for a supply of water for itself and its inhabitants, any municipal corporation may appropriate property within or without the limits of the corporation; and for this purpose any such municipal corporation may appropriate in the manner provided in this chapter, any property or right or interest therein, theretofore acquired by any private corporation for any purpose by appropriation proceedings or otherwise."

Also Section 3679 of the General Code of Ohio, providing in part:

"For water-works purposes and for purposes of creating reservoirs to provide for a supply of water, the Council may appropriate such property as it may determine to be necessary."

The bill then sets forth a resolution of the Counsel of the City of Akron, declaring its intention to appropriate property for water-supply purposes, and an ordinance of the City of Akron, passed by its Council, to appropriate waters of the Cuyahoga River for purposes of public water supply for the City of Akron.

The bill then alleges that the defendant has also committed certain acts in addition to the passage of this resolution and this ordinance, which taken together with the statutes of the State of Ohio referred to in the bill, are in violation of Article 1, Section
57 10, of the Constitution of the United States, guaranteeing to plaintiff that no state shall pass any law impairing the obligation of contracts, and also that by these various proceedings the defendant threatens to and has appropriated without compensation, the property of plaintiff in violation of the Fourteenth Amendment of the Constitution of the United States in that it threatens to and has appropriated the property of plaintiff without due process of law, and denies to plaintiff the equal protection of the law.

It is not alleged that any lands or waters or water rights have

been acquired or are owned by the plaintiff, with the exception that the bill does state that by virtue of its organization and the various proceedings recited in the bill, the plaintiff has acquired a prior right and franchise to appropriate, and is substituted to the rights of certain riparian owners on the river absolutely as the third parties and conditionally as to then holders of title. The defendant is alleged not to be a riparian proprietor, not to require the waters of this river, that by its acts it threatens irreparable injury to the plaintiff.

The main question presented is whether a law which in terms gives to a municipal corporation, after paying compensation, the right to appropriate that which has already been appropriated, or which a private corporation intends to appropriate, deprives the private corporation of any right in which the Constitution of the United States protects it.

The plaintiff contends that the city proposes to divert the waters of the river and is not able to pay damages. The statute in controversy plainly requires that compensation be made the plaintiff before the city can acquire the right to divert, and if the city attempts to do so without compensation it is quite plain that it
58 may be enjoined in the courts of the state of Ohio for exceeding its lawful powers under the Ohio law. Even if the plaintiff has obtained a prior right by priority of action the statutes of Ohio make it necessary that before the city may take this right it must compensate the plaintiff. The plaintiff under these statutes can be deprived of nothing until it has been paid. It is contended that the defendant has already taken the waters described in the ordinance of the council. It does not appear that the appropriation is made merely by passing the ordinance, but it rather appears from a consideration of these sections of the Ohio statutes that the ordinance only directs the appropriation to proceed. No rights are acquired by the municipality until compensation is made in pursuance of a judgment of a court after the verdict of a jury. The ordinance of the city of Akron purporting to appropriate all the waters of the river from a certain point cannot destroy any right of the plaintiff, compensation must be made and the property taken after compensation. Should the resolutions, ordinances and acts of the City of Akron amount to threats to take the property of the plaintiff, this would only mean that these various proceedings, evidence an intention to appropriate these rights of the plaintiff, and this can only be done under the statutes of Ohio. In other words, anything that the defendant does affecting the property rights of the plaintiff it must pay for under the laws of Ohio now in force. Assuming that the ordinance of the City of Akron is adequate to accomplish the purpose for which it was passed, is the law under which the City of Akron acted in passing the ordinance contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States? The plaintiff contends that it is contrary to those
59 provisions, because it provides for no judicial determination of the extend to which the appropriating power may be exercised. That the determination of this matter is a legislative and not a judicial question has been frequently held by the Courts.

It is not upon the question of appropriation of lands for public use but for compensation of lands so appropriated that the owner is entitled to a hearing in court and the verdict of a jury. Zimmerman v. Canfield, 42 O. S., 463, 471; Chandler v. Railroad Commissioners, 141 Mass., 208; Secombe v. Railroad Co., 23 Wall, 108; State v. Jones, et al., 139 N. C., 613; Dillon on Municipal Corporations, 5th Ed., Sec. 1036. Lewis on Eminent Domain, Sec. 567; Cooley on Constitutional Limitations, pp. 759, 760; Kaw Valley Drainage District v. Water Co., 186 Fed., 315; People v. Adirondack Co., 160 N. Y., 225.

In the resolution and ordinance passed by the city counsel for the appropriation of property it is not necessary that any finding be directly made by the council on the necessity of the appropriation, nor is the property owner entitled to a hearing on this question, as the passage of the resolution or ordinance is equivalent to an averment that the necessity had arisen and had been declared and acted upon by the council. Zimmerman v. Canfield, 42 O. S. 463; 471; Dillon on Municipal Corporations, Sec. 1037; Youngs v. St. Louis, et al., 47 Mo. 492.

Nor can the necessity of appropriation of property by a municipal corporation be questioned except for collusion or fraud. Pansing v. Miamisburg, 11 C. C. N. S., 511, 79 O. S. 430.

It must be borne in mind that in the case of the appropriation of property by a private corporation, one of the *the* preliminary
60 questions to be found by the court is "the necessity for the appropriation." Ohio Gen. Code, Sec. 11046. The law is different at to municipal corporation. In the case of a municipal corporation, appropriating property for a street crossing the right of way of a railroad company, the railroad company may go into court in an independent action for injunction and litigate the question of whether the proposed street "will not unnecessarily interfere with the reasonable use of the property so crossed by such improvement"; and they may go into court on this question only because the statute specially makes it a preliminary and judicial question. Gen. Code of Ohio, Sec. 3677, par. 1. As to all other cases of municipalities appropriating property no such requirement is made by the statute and therefore no judicial question arises until we arrive at the stage of fixing the compensation.

It is contended that the City of Akron is unable to pay for the property when appropriated. If this be so, then under the law of Ohio, the property of the plaintiff can never be taken by the City of Akron and the plaintiff cannot in any way be interfered with by this defendant. It is contended that the defendant has taken rights or property of the plaintiff and has manifested an intention to interfere with the exercise of certain rights and property. These rights as claimed by the plaintiff appear to be certain rights which the plaintiff says it has acquired by virtue of its incorporation and organization; the making of surveys, the adoption of plans and programs by action of its directors, and the institution under the laws of the State of Ohio of certain proceedings for appropriation, it claiming that it has appropriated property absolutely as against this

defendant, and conditionally as against the holders of title thereto.

The Constitution of Ohio, Article 1, Sec. 19, provides, that
61 before property is taken for public use, compensation shall first be made. There is no allegation that the plaintiff has taken property in this manner. A consideration of Secs. 11042, 11046, 11057, 11059, 11065 and 11068, 11070 and 11072 of the Ohio Gen. Code indicates that no property is appropriated and no rights acquired under this Ohio law until compensation is made in pursuance of a judgment of a court after the verdict of a jury.

The plaintiff is a private hydro-electric corporation organized under the general laws of Ohio; having been granted its charter it had the right to be a corporation, and except so far as limited by law, it had the right to proceed or not as it saw fit by appropriation of otherwise with the accomplishment of the purposes which it has itself declared. It was not by virtue of its incorporation or by virtue of its franchise bound to carry out its scheme of development. A large number of cases have been cited in support of the doctrine, that by virtue of its adoption of plans the company has thereby acquired a right to appropriate the property of others included in this plan, and that this right has thereby acquired a priority over all others, except the State acting directly upon this property. This might be true as between private corporations, but as between a private corporation vested with the right of eminent domain for the carrying out of the purposes of a quasi public nature and the subdivision of a sovereign state, like a municipal corporation which exercises the power of eminent domain to carry on the vital needs of its population for a supply of water for domestic purposes this priority cannot exist. The municipality is given a paramount right to appropriate property needed for that purpose, although the same property has become the subject of earlier appropriation proceedings by a private corporation.

62 It is eminently just that it should not be otherwise. The right given is proportionate to the need and must be effective. The action of the City of Akron was for the commendable purpose of supplying its inhabitants with pure water; the purpose of the plaintiff corporation was to conduct its hydro-electric operations for gain. The bill presents no federal question. If the defendant takes any property of the plaintiff it may do so under the statutes of Ohio, and no statute is before this court which violates any provision of the Federal Constitution.

If any of these laws are violated by the defendant, the plaintiff has a full, adequate and complete remedy in the courts of Ohio.

The motion to dismiss the bill will be sustained.

Cleveland, Ohio, November 25, 1913. DAY, *Judge.*

63 (*Order Dismissing Bill and Leave to File Amended Bill Entered February 13th, 1914, by Judge Day.*)

No. 192. Equity.

THE CUYAHOGA RIVER POWER COMPANY
vs.
THE CITY OF AKRON, a Municipal Corporation.

This cause came on to be heard on the motion of the defendant to dismiss the bill of the plaintiff and was argued by counsel and submitted to the Court, and the court being fully advised in the premises, finds that the motion to dismiss the bill is well taken and is hereby sustained, to which holding and finding of the Court the plaintiff excepted, and on application of the plaintiff for leave to file an amended bill, said application is granted and the plaintiff is hereby allowed five days within which to file an amended bill.

To which permission to file an amended bill the defendant here and now excepts.

It is therefore ordered adjudged and decreed that the defendant revover of plaintiff its costs herein to be paid by the plaintiff before the filing of said amended bill.

64 In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 192. Equity.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
vs.
THE CITY OF AKRON, a Municipal Corporation, Defendant.

First Amended Bill of Complaint.

To the Honorable the Judges of the District Court of the United States for the Northern District of Ohio, Eastern Division:

I. By leave of Court first had and obtained The Cuyahoga River Power Company, a public utility corporation duly organized and existing under and by virtue of the laws of the State of Ohio, and a citizen and resident of said State of Ohio and of the City of Cleveland, in the Northern District of Ohio, Eastern Division, brings this its first amended bill against The City of Akron, a municipal corporation organized and existing under and by virtue of the laws of the State of Ohio, a citizen and resident of said State of Ohio, and in the Northern District of Ohio, and the Eastern Division.

And for its cause of action plaintiff states:

II. That the amount in controversy herein, exclusive of interest and costs, exceeds the sum and value of $3,000.00. That this suit arises under the constitution and laws of the United States.

III. That Articles of incorporation of the plaintiff company were filed in the office of the Secretary of State at Columbus, Ohio, on the 29th day of May 1908. The plaintiff's name was therein
65 stated as "The Big Cuyahoga Light, Heat & Power Company"; on the 12th day of November, 1908, by amendment of its Articles of Incorporation duly made and certified plaintiff's corporate name was changed to, and now is, "The Cuyahoga River Power Company."

That on the 12th day of January, 1912, the plaintiff, by a further amendment of its Articles of Incorporation, duly made and thereafter duly filed and recorded on February 2, 1912, in the office of the Secretary of State of Ohio, amended the original purpose clause of its charter, so as to state the purpose of its organization and its said purposes ever since and now are, as in the next paragraph set forth.

That plaintiff has duly complied with all requirements of the laws of Ohio relating to such corporations and by filing said certificate and complying with such requirements became possessed of all of the powers and rights of a corporation under the laws of Ohio and particularly of those set forth in Section IV hereof, under the provisions of Sections 10128 to 10134, of the statutes of Ohio, inclusive. That said statutes were declared constitutional by the Supreme Court of Ohio, January, 1908, In re Little Miami Light, Heat and Power Co. vs. John T. White, et al.

IV. That Plaintiff is duly incorporated and organized for the purposes of acquiring, erecting, building, maintaining and operating a dam, or series of dams in the Big Cuyahoga River, Tuscarawas River, Mud Brook, Brandywine and Tinkers Creek, and the tributaries of each of them, being situated in Cuyahoga, Medina, Summit, Portage, Stark, Geauga, Tuscarawas and adjacent counties, in the State of Ohio, to raise and maintain a head of water; of constructing, maintaining canals and locks and race ways, to regulate and carry said head of water to any plant or power house where electric-
66 ity is generated; of using said water as power in generating and producing electricity; of constructing, erecting or maintaining tubes, pipes or conduits through which electricity may be carried and transmitted, and a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity; of acquiring, producing, manufacturing, generating, transmitting or selling electricity for light, power and other purposes; of supplying and selling electricity to municipalities and other public agencies; of acquiring holding and selling franchises and privileges to supply the same to municipal corporations; of acquiring by condemnation, lease, purchase or otherwise, and of possessing, holding and selling such real estate and personal property as may be necessary or convenient for the proper conduct of said business, and of doing any and all other things necessary and incident to any of said purposes.

That the said purpose clause of plaintiff's charter, as so amended, sets forth that the improvements plaintiff will construct, not to be located at a single place, will be for the purpose of transmitting

and conducting electricity, and will have its eastern terminus at or near the Village of Burton Station in Geauga County; its western terminus at or near the confluence of Tinkers Creek and the Cuyahoga River in Cuyahoga County, and its southern terminus at or near Canal Dover in Tuscarawas County, and with its main line and branches will pass in or through the counties of Cuyahoga, Summit, Medina, Portage, Stark, Geauga and Tuscarawas in said State.

V. That plaintiff is a public utility corporation under the laws of Ohio.

That plaintiff's corporate purposes and powers as in its said charter set forth are confined to the acquisition and development of the property therein described and as hereinafter alleged to
67 have been taken by defendant, and that plaintiff has no other purposes or powers except those taken by defendant.

That said incorporation vested plaintiff on the date aforesaid, with powers of eminent domain.

That by virtue of said charter plaintiff became vested with the power of buying and selling electricity for public use in connection with said corporate purposes, without the restrictions placed by the laws of Ohio upon the buying and selling of electricity by individuals for public use, and that said right and privilege constitute a franchise and property under the laws of the State of Ohio requiring compensation upon the taking thereof by any other person or persons, artificial or otherwise, having the power of eminent domain.

That said right t be a corporation with said purposes and powers, including the power of eminent domain, constitute a franchise, franchises, property and properties under the laws of the State of Ohio, of a nature requiring compensation upon the taking thereof by any other person or persons, artificial or otherwise, having power of eminent domain.

VI. That after its incorporation and organization, the plaintiff in the exercise of its charter powers, did, on the third day of June, 1908, procure a plan of the Roberts-Abbott Co., Consulting Engineers, for the developments contemplated by its charter and at great cost and expense caused surveys, plans, maps, plats and profiles to be made therefor; it likewise entered upon, located and definitely defined the property rights and other privileges required therefor; it caused estimates of the cost of construction to be made and provided; and having so determined upon and defined said proposed improvements, the project as aforesaid together with the plans, surveys, plats, profiles and estimates were then and there approved and adopted by Plaintiff's Board of Directors as defining the improvement then to be undertaken by it.

68 The said Resolution approving and adopting the said Plan was in the following terms:

"Resolved that the plan, reports and surveys of the Roberts-Abbot Company be approved and adopted and that this Company proveed forthwith to construct and build the improvements set forth in the reports and surveys and in the manner therein set forth;

"Resolved, further, that said plan, reports and surveys of the Roberts-Abbott Company be made a part of the corporate records of the Company, and that they be properly marked for identification."

VII. Pursuant to said plan plaintiff determined to construct among other improvements, a dam at or near Portage Street in the Village of Cuyahoga Falls on the site of the lower dam of the Falls Clutch and Machinery Co. The crest of said dam was fixed at an elevation of 1,000 feet above set level, making the height thereof substantially seventy (70) feet. And plaintiff determined to conduct the water of said river from said dam so constructed along the left bank of said river at an elevation slightly less than 1,000 feet above sea level by means of a suitable canal or conduit, to a point on said left bank a short distance westerly of the west corporation line of Cuyahoga Falls at which point the bed of said river is at an elevation of 760 feet above sea level, and plaintiff proposed by means of a hydro-electric plant there to be constructed and equipped and suitably adapted for the purpose, to convert the water power from the resulting 236 feet of fall into electric energy.

Descriptions of the several parcels of property required for said project adopted as aforesaid, were submitted to plaintiff at
69 said Directors' meeting June 3, 1908, and were then and there duly adopted.

VIII. That thereafter, and during the year 1908, plaintiff made further examination and surveys of the water-shed of the Cuyahoga River and found it necessary to provide for the construction of a reservoir in the County of Geauga by means of which to store, increase and equalize the flow of said river. It found it necessary also to provide for a diversion of a portion of the water of said river at or near Gaylords Bridge above the Village of Cuyahoga Falls, into and to the basins of Mud Brook and Brandywine Creeks in Summit County, and there to provide additional dams and reservoirs, and thence carry the water by means of canals, conduits and aqueducts to the easterly bluff of the Cuyahoga River, near the Village of Vaughn where, at an elevation of 993 feet above sea level, a fall of 358 feet is obtainable from which point the water, after passing over the wheels of the plaintiff, is returned to said river. The plaintiff found it necessary further to construct an additionaal hydro-electric plant at said Village of Vaughn to utilize the power there thus obtained for electric energy.

IX. That plaintiff caused surveys, maps, plans and profiles and other details for these improvements to be prepared and thereafter, to wit, on the 23d day of April, 1909, its Directorate committed itself to and adopted a plan and development program in accordance therewith, and supplemental to and additional to the plan first above described. The resolution approving and adopting the said Supplemental Plan was as follows:

"Be it resolved, that the plans, surveys and report of The Roberts-Abbott Co., be, and the same are, hereby amended by the
70 adoption of the Plans, Surveys and Reports of H. A. von Schon dated Dec. 29, 1908, and also that the development

program of this Company be hereby fixed and determined as the same is set forth in said Report of H. A. von Schon upon pages 25 to 27 inclusive of the original copy, as follows, to wit:

(1) To construct a reservoir across said river south of Burton Station, in Geauga County, Ohio.

(2) To carry the water of said river from said reservoir in and down the natural channel of the river to the town of Cuyahoga Falls, where a dam is to be erected below the Gaylord Bridge, at the northern boundary of Cuyahoga Falls at an elevation of 993 feet. (3) To cut a channel from the Cuyahoga River about 2 miles above Gaylord Dam to connect with Silver Lake whose elevation is now about 993 feet. (4) To connect Silver and Little Lakes by a channel. (5) To cut a channel from Little Lake to the Mud Brook Channel. (6) To close Mud Brook by a dam, above the iron bridge crossing, raised to an elevation of 993 feet. (7) To widen Mud Brook and Brandywine channels to the north end of the Brandywine Basin. (8) To close Brandywine Basin by a dam to be located near the Cleveland Boys Farm, raised to the elevation of 993 feet. (9) To cut a canal from the Brandywine Dam following the 995 foot contour passing Little York Bridge on the south, and terminating at the Brandywine defile about 1/3 of a mile west of Little York. (10) To construct a flume across the Brandywine Gorge. (11) To cut a canal from The Brandywine Ravine one-half a mile westerly to the first north and south road west of Little York and there to terminate in a bulkhead. (12) To lay and construct a pipe line from this canal bulkhead down the incline to a point on the Brandywine 500 feet east of the State Canal. (13) To construct a power station at the point where said pipe line terminates. (14) To widen and deepen the Brandy-

71 wine at this point to its junction with the Cuyahoga River. (15) To enlarge the present culvert by which the Brandywine passes under the State Canal. (16) To construct a transmission line to the market point.

X. That on the 8th day of April, 1912, having caused surveys and plans to be made for all that portion of the improvements to be built by it, located in Portage and Geauga Counties, and having adopted such surveys and plans, the plaintiff determined to proceed with the construction of its storage reservoir in the County of Geauga as set forth in the item number one of the development program aforesaid. It was then determined to locate said storage reservoir south of the Village of Burton Station, and construct the same to an elevation of 1,120 feet above sea level with a storage capacity of 140,250 acre feet, and to provide for the mainten-ce of a minimum flow of 300 cubic feet per second or over 200,000,000 gallons daily into the Cuyahoga River from said reservoir, it being the purpose of the plaintiff to preserve and store in said reservoir, the entire water supply of said river basin above said dam, and control the same in such manner so that the minimum flow aforesaid may be maintained. Plaintiff further determined to proceed with the construction of the Gaylord Dam as provided in said development program. That at that date, April 8th, 1912, complete sur-

eys, maps and descriptions of all lands necessary to be acquired
y it for the construction of its reservoirs and dams and for the
iparian rights and easements along the Cuyahoga River through
he Counties of Geauga, Portage and Summit to the Gaylord Bridge
t Cuyahoga Falls were before plaintiff's Board of Directors and
aid surveys and maps had been or were then definitely adopted
y the plaintiff; and the plaintiff's proposed improvement was
lefinitely outlined, fixed and determined.

Plaintiff has hereto attached a schedule showing the
72 various proceedings taken by it from the date of its organi-
zation to May 7, 1912, to perfect its plans of development
dopt its locations and to purchase or appropriate the necessary
ands, easements, water rights, etc., said schedule being made a part
ereof and marked "Exhibit B."

XI. That neither the defendant nor any person, corporation or
ody politic had theretofore ever made any locations, surveys or
ppropriations of any of the waters of the Cuyahoga River for the
urpose of utilizing its waters and water power for any public use
nd said proceedings and locations of plaintiff were for a public
se and were prior in point of time to all such proceedings and
teps as have been taken by defendant, as hereinafter alleged, to
ppropriate and acquire property rights in the waters and bed of
aid river; that plaintiff by virtue of its incorporation and organiza-
ion, and its various proceedings taken as aforesaid, has acquired
he prior right and franchise over every other person, corporation
nd body politic to appropriate and acquire the lands, water, water
rights, riparian rights, easements and other privileges on the Cuya-
hoga River for a public use and now has therein an exclusive loca-
tion and exclusive franchises, water rights and property rights for
the purpose of developing and utilizing the water power thereof
and to construct, maintain and operate the several improvements
provided for in its charter and by its said development program;
that by virtue of its said acts and proceedings plaintiff has acquired
and now has the exclusive franchise to develop and utilize for a
public use the water of the Cuyahoga River according to its said
development programs heretofore duly adopted as aforesaid and
that said franchise is superior and prior in point of time and right
to any powers, rights and franchises which defendant may have
acquired or can acquire in said river.

73 XII. That plaintiff by reason of the steps hereinbefore
set out, became substituted to all of the rights of the riparian
owners on the Cuyahoga River, and became, in truth and in fact,
the riparian owner on such river, absolutely as to third parties, and
conditionally as to the holders of title.

That plaintiff by reason of the steps hereinbefore set out ac-
quired the vested right to divert and use all the waters of said river
for power purposes, subject only to the payment to riparian owners
thereon of any damages to their property caused by such use or
diversion.

That plaintiff by reason of the steps herein before set out ac-
quired a vested right in and pertaining to the aforesaid lands on

the Cuyahoga River of a nature constituting property under the laws of Ohio requiring compensation upon the taking thereof by any other power of eminent domain.

That plaintiff by reason of the steps hereinbefore set out became vested with a paramount title in, and an exclusive franchise right in, and an exclusive right to proceed against said riparian land for hydro-electric purposes theretofore belonging to the State of Ohio. That said right, paramount title and exclusive franchise was acquired by plaintiff from the State of Ohio by its incorporation and acts thereunder, as above set forth, and that said rights became vested in plaintiff affixed to said lands without reference to compensation to the record owners of said land for the private rights of property therein, and that said rights, paramount title, and exclusive franchises are property, property rights and land requiring compensation under the laws of Ohio upon the taking thereof by any other power of eminent domain.

That plaintiff by reason of the steps herein before set out became substituted to all of the rights of the State of Ohio on the
74 Cuyahoga River for its charter purposes and became in truth and in fact the paramount riparian owner on such river for such charter purposes absolutely as to third parties and conditionally as to the holders of title.

That such paramount ownership of plaintiff in the Cuyahoga River was and is an equitable title to the several parcels of property necessary for the construction of its plant and was and is the equitable title to such a right of way as is referred to in Section 4, Art. 13 of the Constitution of the State of Ohio, which said equitable title gives plaintiff the right to have the legal title to said right of way transferred to it upon payment of the compensation.

XIII. That after the 3rd day of June, 1908, plaintiff began proceedings in the Probate Courts of Summit and Portage Counties to appropriate and acquire for the construction of its said works, all the lands, rights and easements and water privileges required therefor, below the Village of Kent (except the Munroe Falls site), and that the proceedings therefor have been followed up with due diligence; that condemnation proceedings instituted by plaintiff to acquire said property are now pending in courts of record of the State of Ohio as follows:

(1) In the Supreme Court of the State of Ohio, #13444, The Northern Realty Co., Plaintiff in Error vs. The Cuyahoga River Power Co., Defendant in Error.

Filed in Probate Court of Summit County February 3, 1911; decision of Circuit Court rendered October 27, 1911, was in favor of this plaintiff and was affirmed by the Supreme Court of Ohio, September 23, 1913, and said appropriation proceeding now stands remanded to the Court of Common Pleas of Summit County for trial.

75 (2) In Probate Court of Portage County entitled "The Cuyahoga River Power Co., Plaintiff, vs. William S. Kent and Mary P. Kent, Defendants."

No. 2369, filed May 7th, 1912.

(3) In the Probate Court of Summit Co., entitled "The Cuyahoga River Power Co., a corporation, Plaintiff vs. The Falls Heat, Light & power Co., a corporation; The Walsh Paper Company, a corporation; Cornelius M. Walsh, and Jennie M. Walsh, wife of defendant Cornelius M. Walsh, defendants."

No. 4610, filed April 9, 1913.

The property, the subject of the said proceeding, is the same property referred to in paragraph XXIV hereof, as belonging to C. M. Walsh and the Walsh Paper Company, C. M. Walsh, Parcel No. 1, C. M. Walsh, Parcel No. 2, and the Walsh Paper Company.

That under Section 11300 of the G. C. of Ohio, defendant can acquire no interest in the property under appropriation by plaintiff and any condemnation proceedings brought by defendant against the said parcels of property are void.

XIV. That plaintiff has at great cost and expense procured plans for the distribution of its product after the completion of its proposed power plants as follows:

(*a*) Plan and proposed contract for supplying the City of Cleveland.

(*a*) With entire output.

(*b*) With 20,000,000 Kw. hours annually.

(*b*) Plan for supplying the Cleveland Electric Illuminating Company with its entire output.

(*c*) Plan for supplying defendant, The City of Akron, with its entire output.

(*d*) Option on Kent Water & Light Co. and plan for
76 supplying Kent and Akron from Kent plant pending completion of Power House at Vaughn.

(2) That plaintiff, in February, 1912, procured under the laws of the State of Ohio the due incorporation of The Western Reserve Water Co. in order to utilize the waters of the Cuyahoga River and the storage of its proposed reservoirs for purposes of domestic water supply to whatever extent the necessity for such use developed and procured at great cost and expense plans and surveys therefor.

That said The Western Reserve Water Co. has had negotiations with the cities of Youngstown, Warren, Kent and Cleveland and with defendant, and plaintiff believes a great saving of money can be made by a combination of both functions in one development and a better, cheaper and safer service given to the public.

(3) That in September and October, 1912, plaintiff, at the solicitation of defendant made formal offers in writing to supply defendant with electrical current for the period of five years and such offers were duly considered by defendant and were refused and a contract for such service was awarded to The Northern Ohio Traction & Light Company and said company is now supplying said defendant with all of its electric current.

That in June, 1912, The Western Reserve Water Company made formal offer to the defendant herein to supply said defendant with water for purposes of domestic water supply sufficient to meet the needs of defendant for a period of forty years, and at the price of one cent per thousand gallons, or about 40% of the estimated cost

of production to said defendant, which said offers were formally refused. Said plaintiff is not now supplying defendant with either electricity or water and does not intend to do so.

77 (4) That plaintiff has taken the steps required by law to increase its capital stock from $10,000 to $3,000,000 common and $2,000,000 preferred, and has applied to the Public Service Commission of Ohio for authority to make immediate required issues thereof.

XV. That the plaintiff has proceeded with due diligence and in good faith in the acquisition for a public use of said locations, franchises, water rights and property rights, in the making of all necessary surveys, plans, maps and descriptions, in the making of its locations of routes, courses, and sites, in its negotiations with the owners of said properties, water rights and priv-leges for the purchase of the same, and where such negotiations had failed, through inability to agree upon the amount of compensation to be paid for such properties, in the prosecution of subsequent condemnation proceedings with the object of appropriating the same, according to law; that in order to carry out these various steps and proceedings plaintiff has expended large sums of money and has caused its securities to be sold up to the amount of three hundred and fifty thousand dollars ($350,000) par value; and that such securities are now held by bone fide purchasers for value; that such proceedings and expenditures have been had and made in good faith in accordance with a definite, comprehensive and efficient plan or program for the economical development of hydro-electric power from the waters of the Cuyahoga River; that plaiin-iff's said development, on information and belief, will be of great public benefit, and will be worth upwards of six million dollars ($6,000,000) more than the actual costs of acquiring the lands and water rights and the building of the necessary structures.

78 XVI. That plaintiff's said improvements and water power, when developed and constructed and the flow of said river equalized in accordance with said development program, will yield at plaintiff's proposed power plant at the village of Vaughn, not less than 20,827 electric horsepower for continuous service 10 hours daily, and will permit a net delivery of 52,560,000 k. w. hrs. in nearby towns and cities, as follows: Ravenna, Kent, Cuyahoga Falls, Akron, Barberton, Massillon, Canton, Elyria, Lorain and Cleveland. Within a radius of 30 miles *in* a population of over 1,000,000 persons. Plaintiffs says that there is a need and market for all the electric power thus capable of generation with said water power at rates from one to three cents per kilowatt hour; that a net annual income of $395,300 may reasonably be expected to be realized from the operation of said power plant, if plaintiff's said development program be carried out without interference from defendant.

XVII. That the plans of development proposed by plaintiff conserve the possibilities of the Cuyahoga River and its tributaries for purposes of hydro-electric power and domestic water supply to the greatest possible degree and are of vital and permanent importance to the cities, towns, manufacturers, electric light and railroad corpo-

rations and other industries located upon the watershed of said river, in the following manner:

(Reference is hereby made to conservation map No. 200 which is made a part hereof and marked "Exhibit C.")

(1) Abundant storage is secured by development of plaintiff to equalize the flow of the river to 300 second feet, providing two years of extreme drought succeed each other, by means of the use of a great natural reservoir site in Geauga County, with a storage capacity of two and one-half billion cubic feet. This region of
79 sparsely populated, and the site for the dam for said reservoir is located upon natural rock foundation. Said reservoir is located twenty-five miles up stream from the Village of Kent, and all danger from the construction of such a reservoir as is proposed by defendant is removed.

(2) The flow of said river is equalized in and through the Village of Kent in Portage County, doing away with flood damages and rendering also an abandoned water power of value and of great public benefit to the said village.

(3) The flow of said river is equalized and maintained at 300 cubic second feet to the limits of the Village of Cuyahoga Falls in Summit County, providing a constant, reliable supply for domestic use and drainage.

(4) The flow of said river is diverted in part at Gaylord Bridge Dam and stored in the Brandywine Basin, thereby lessening dangers of floods in the main channel of the river and frequent damage to railroad property and interruption of freight and passenger service.

(5) The flow of said river is equalized through its entire length in Cuyahoga County from Vaughn to Lake Erie, thereby largely reducing the damages from floods of over two hundred riparian owners in said portion of the river, including particularly the City of Cleveland. The annual cost of dredging and removing the accumulation of debris is stated by the engineers of said city to vary from 45 to 90 thousand dollars per annum.

(6) The equalization of the flow of said river in the navigable portion thereof and under the control of the U. S. Government, is an aid to the navigability thereof and of great benefit to the shipping interests dependent upon or using the harbor of said City of Cleveland.

80 (7) Plaintiff alleges that about 700 owners of property are affected by its proposed development. That the fee to the lands is required from 153 or 16% of the whole.

That diversion rights are required from 96 or 14% of the whole.

That the right to equalize the flow is required from 480 owners or approximately 70% of the whole. A very large proportion of the property of the present owners is benefited by the proposed plans of plaintiff.

XVIII. That the defendant, City of Akron, has not heretofore adopted any plan for supplying its inhabitants with water from the Cuyahoga River, nor, save as hereinafter alleged, made any locations of properties and water rights on said river for such purpose;

That no plans for the use of the waters of the Cuyahoga River for

purposes of domestic supply were ever considered by defendant except those embodied in a certain report submitted by the Board of Control of the City of Akron to a meeting of Council held Aug. 28, 1911. That the only action taken by the defendant upon said report was at a meeting of the Common Council held Sept. 6, 1911, the minutes of which meeting are as follows in part:

"Upon motion, the report of the Board of Control transmitting to the city council the report of the engineers F. A. Barbour and E. G. Bradbury on an improved water supply for the City of Akron, was unanimously accepted."

That the said report of said engineers was not adopted at said meeting and has never been so adopted at any subsequent meeting of council of the said City of Akron.

That the said Report of said engineers presents various plans and sources from which defendant may secure a new source of supply or continue to use the present source.

81 That the said report of said engineers fixes the amount of money required from defendant at about $3,500,000.00, if the Cuyahoga River is adopted as a source of supply. That said amount was determined by assuming the damages to property in the Cuyahoga River at $450,000. That said defendant well knew said amount was grossly inadequate and ignored absolutely the prior rights of plaintiff. That the rights of plaintiff are worth $6,000,000 and defendant has not constitutional or statutory authority to raise such an amount of money, in addition to existing indebtedness.

XIX. That the legislature of Ohio on May 7, 1911, enacted certain statutes known as "House Bill No. 357" contained in Volume 102 of the Ohio Laws, page 175, purporting to give to defendant certain rights in the waters of the Cuyahoga River theretofore owned by the State of Ohio.

That said statute is unconstitutional and void and conferred no power or authority upon defendant because said statu-e is special legislation and in violation of Art. XIII, Sec. (1), of the Constitution of Ohio, which is as follows:

"The General Assembly shall pass no special Act conferring corporate powers," as well as in violation of Art. 11, Sec. (26), of the Constitution of Ohio, which is as follows: "All laws of a general nature shall have a uniform operation throughout the State."

That Section 3677 of the General Code of Ohio, paragraph 13, enacted in 1910 provides in part as follows:

"For providing for a supply of water for itself and its inhabitants by the construction of wells, pumps, cisterns, aqueducts, water pipes, dams, reservoirs, reservoir sites and water works, and for the protection thereof, and to provide for a supply of water for itself and its inhabitants, any municipal corporation may appropriate property within or without the limits of the corporation; and for this

82 purpose any such municipal corporation may appropriate in the manner provided in this chapter, any property or right or interest therein, theretofore acquired by any private corporation for any purpose by appropriation, proceedings or otherwise."

That there is no statute other than the foregoing under color of

which defendant could cla[illegible] authority to condemn the property and franchises of plaintiff. [illegible]at said statute has been repealed as hereinafter alleged.

That Sec. 3678 of the General Code of Ohio, which became a law May 9, 1913, provides in part as follows:

"In the appropriation of property for any of the purposes named in the preceding section the corporation may, when reasonably necessary, acquire property outside the limits of the corporation."

That said foregoing provision impliedly repeals the provision in Sec. 3679 of the General Code, under which defendant has assumed to act, which provides that:

"For water works purposes and for purposes of creating reservoirs to provide for a supply of water, the council may appropriate such property as it may determine to be necessary."

That said provision of Sec. 3679 is in conflict with Art. 1, Sec. 16 of the constitution of Ohio which is as follows:

"All courts shall be open and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due process of law and shall have justice administered without denial or delay."

That said provision of Section 3679 is therefore null and void.

That said provision is void also as being in conflict with Art. 11, Sec. 28, of the Constitution of Ohio which provides: "The
83 General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts."

XX. That on September 3, 1912, the people of the State of Ohio adopted an amendment to the Constitution regarding municipal corporations, which amendment is now Article XVIII of said Constitution. Sections 4, 5, 6 and 10, 11 and 12 of said amendment provide for the acquisition of public utilities by municipalities in the following terms:

SECTION 4. Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

SECTION 5. Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of Section 8 of this article as to the submission of the question of choosing a charter commission.

84 SECTION 6. Any municipality, owning or operating a public utility, for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per centum of the total service or product sup-lied by such utility within the municipality.

SECTION 10. A municipality app-opriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law.

SECTION 11. Any municipality appropriating private property for a public improvement may provide money therefore in part by assessments upon benefited property not in excess of the special benefits conferred upon such property by the improvements. Said assessments, however, upon all the abutting, adjacent, and other property in the district benefited shall in no case be levied for more than fifty per centum of the cost of such appropriation.

That said foregoing amendment became effective November 15, 1912.

That Schedule 20 of said amendments to said constitution provides that:

85 "All the laws then in force, not inconsistent therewith, shall continue in force until amended or repealed; provided that all cases pending in the courts on the first day of January, 1913, shall be heard and tried in the same manner and by the same procedure as is now authorized by law."

That said defendant has no case or cases pending in the courts against plaintiff on the first day of January 1913.

That Section 3677 and Section 3679 of the General Code of Ohio and House Bill # 357 are each and all inconsistent with the provisions of Article XVIII, Sections 4, 5 and 6 and Sections 10, 11 and 12 of the constitution of the State of Ohio and are repealed by said constitutional enactment.

That plaintiff is a Public Utility Corporation under the laws of Ohio; that plaintiff is not supplying defendant with its product; that defendant refused the offers of plaintiff hereinbefore referred to, to supply defendant with its product; that the franchises and property of plaintiff are not subject to the exercise of the power of eminent domain by defendant.

That defendant is now without constitutional power or authority to condemn the property and franchises of plaintiff.

XXI. That on the 27th day of May, 1912, the Council of said City purported to pass a Resolution known as Resolution No. 3241,

declaring intention to appropriate property for water-supply purposes.

That thereafter, to wit, on said 26th day of August, 1912, Council of defendant passed an ordinance known as Ordinance 3396, purporting thereby to appropriate to its use for the purpose of supplying water to the City of Akron and its inhabitants, all of the water of the Cuyahoga River as described in said Resolution Number 3241 as hereinabove alleged. Said ordinance is as follows:

86 Ordinance No. 3396.—To Appropriate Property for Water-supply Purposes.

Be it ordained by the Council of the City of Akron, State of Ohio, two-thirds of all members elected thereto concurring:

SECTION 1. That by virtue and in exercise of the power and authority contained in House Bill No. 357 of the Ohio Legislature contained in Vol. 102 of the Ohio Laws, page 175, passed by the Legislature of the State of Ohio, May 17, 1911, and in partial execution thereof, and by virtue and in exercise of every other power and authority thereto enabling the following described property and any and all rights of interest therein, be and the same is hereby appropriated to public use for the purpose of supplying water to said City of Akron and the inhabitants thereof, to wit; All the waters of the Cuyahoga River at and above a line heretofore fixed as the axis of a proposed dam to be built by said city, in the Township of Franklin, County of Portage and State aforesaid; said line of appropriation being approximately twelve hundred (1200) feet northeast from the point where the Cleveland & Pittsburg Division of the Pennsylvania Railroad now crosses said Cuyahoga River, and being shown upon a plan dated June, 1911, prepared by Frank A. Barbour and Edward G. Bradbury and bearing the inscription "City of Akron Improvement of Water Supply Plan Showing Development of Cuyahoga River, Sheet 9;" and also all the water of all the tributaries of said Cuyahoga River, above said line of appropriation and all the waters which may flow into and from Cuyahoga River and the tributaries thereof above said line, for the purpose of diverting the same for the purpose aforesaid, at or near said line, and not elsewhere.

SECTION 2. That the solicitor be and is hereby authorized
87 and directed to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for such property.

SECTION 3. That the costs and expenses of said appropriation be paid out of the proceeds of the sale of bonds issued under authority of an ordinance entitled "Ordinance 3233, to issue bonds for the purpose of extending, enlarging, improving, repairing and securing a more complete enjoyment of the water works of the City of Akron, Ohio, and for the purpose of supplying water to said city and the inhabitants thereof," passed May 27, 1912.

SECTION 4. That this ordinance shall take effect and be in force from and after the earliest period allowed by law."

That defendant is without valid statutory authority to appr
priate property for domestic water supply and said ordinance i
null and void.

XXII. That defendant has taken and threatens and intends t
continue to take plaintiff's property, rights, franchises and privilege
aforesaid without making or offering to make any just and ade
quate compensation therefor.

That upon the passage of said ordinance it became the duty o
the solicitor of the City of Akron under Section 3681 of the Gen
eral Code of Ohio to make application to the Courts of Commor
Pleas to condemn plaintiff's properties, as hereinbefore set forth
That defendant through its said solicitor, or any other person, has
failed, within a reasonable time from the passage of said ordinance,
refuses to, and states that it does not intend to bring such proceed-
ings against this plaintiff. That therein any thereby defendant is
acting without due process of law and in violation of the
88 Fourteenth Amendment to the Constitution of the United
States.

That the fund of $1,250,000 provided for in said resolution and
ordinance has been dissipated and largely used for other purposes.
That there is no fund on hand to pay for any property taken or to
be taken from plaintiff and that there is in truth and in fact a deficit
in the water works fund of defendant, exclusive of the value of
property taken from this plaintiff and other riparian owners upon
said river.

That the fund of $1,250,000 alleged to be reserved by said ordi-
nance to provide for payment for water rights upon said river is
grossly inadequate and is specified in said ordinance in bad faith.

XXIII. That the defendant has let contracts for and commenced
construction of, and unless restrained, purposes to continue such
construction work in and about the erection of a reservoir in the
bed of said River above the Village of Kent, and to take such steps
to d-iver the River's water at said point, as has permanently inter-
fered with and will ultimately destroy the value of the property
rights, franchises and privileges of plaintiff, in and to the waters of
said River acquired by its said prior incorporation, locations and
proceedings, and has completely destroyed, and made futile plain-
tiff's entire corporate purpose.

That the said dam referred to is now, and has been, under con-
struction for many months and that the purpose of defendant is to
complete and close said dam and divert the waters of the Cuyahoga
River without due or any process of law and to complete the de-
struction and fraudulent confiscation of plaintiff's corporate rights
and property; that the declared purpose of defendant has been to
divert the waters of said Cuyahoga River and to compel the owners
of rights taken, to sue for damages or lose their property.
89 That in an action for injunction brought against defend-
ant by W. S. Kent and others on account of the construction
of said dam and reservoir, defendant has maintained before the
Court of Common Pleas in Summit County, Ohio, that it had the
right to take first and pay afterward.

XXIV. That defendant on the 22d day of April, 1913, and without notice to plaintiff and by collusion with the Falls Heat, Light & Power Company, a corporation, the Walsh Paper Company, a corporation, Cornelius M. Walsh and Jane J. Wash, wife of said Cornelius M. Walsh, brought a pretended condemnation proceeding against the property owned by the said Falls Heat, Light & Power Company, a corporation, the Walsh Paper Company, a corporation, Cornelius M. Walsh and Jane J. Walsh, wife of said Cornelius M. Walsh, being the same property covered by the locations and surveys duly adopted by plaintiff on June 3, 1908.

At the time said pretended condemnation proceeding was brought by defendant the said property was also subject to a prior condemnation proceeding by plaintiff which had been filed in the Probate Court of Summit County on the 9th day of April, 1913, and is designated upon the docket thereof as No. 4610. XXV.

That on April 10, 1913, plaintiff served notice by registered mail upon defendant as follows:

"It has been called to the attention of the undersigned corporation that the City of Akron advertised for bids to be received on April 8, 1913, for contracts for the erection of a dam and construction of a reservoir, to carry out some scheme or plan, as mentioned in such advertisements, for the diversion, at or near Kent, of the water of Cuyahoga River for water supply for the City of Akron and its inhabitants.

90 This corporation, in its letter to you, dated March 29, 1913, has fully outlined the purposes and powers of the corporation, and a repetition in this letter is unnecessary. You and each of you are hereby notified that any diversion of the water of Cuyahoga River, at or about Kent, by the City of Akron, will necessarily invade the exclusive rights which this company now has in and to the waters of the Cuyahoga River, and that this corporation stands on its rights."

That plaintiff has attempted to purchase from defendant the rights necessary for its corporate purposes, to equalise the flow of the Cuyahoga River as appurtenant to certain lands owned by defendant in Portage County, and said defendant has refused to make such sale, although the equalization of the flow of said river as appurtenant to said lands was a benefit to defendants, and upon information and belief that such refusal was in bad faith and for the purpose of hindering and destroying the development of plaintiff upon said Cuyahoga River.

XXVI. Plaintiff alleges that the intent, purpose, and effect of said statutes of the State of Ohio, Sections 3677 and 3679, G. C., and of House Bill No. 357 and Resolution No. 3241 and Ordinance No. 3396 of defendant, are, to appropriate and destroy without constitutional right and without compensation the rights and franchises secured to plaintiff through and by virtue of the charter granted it by the State of Ohio and the due acceptance thereof by plaintiff, and the several amendments thereto, and so said statutes, resolution and ordinance are in violation of Article I, Section 10 of the Constitution

of the United States, guaranteeing to plaintiff that no State shall pass any law impairing the obligation of contracts.

And plaintiff further alleges that under color of said stat-
91 utes, resolution and ordinance and by the construction of said dam and reservoir defendant has seized upon and appropriated, without compensation, the property and franchises of plaintiff, and so defendant has violated the Fourteenth Amendment of the Constitution of the United States in that it has taken the property of plaintiff without due process of law, and denies to plaintiff the equal protection of the law. That said defendant further pretends under said statutes, resolution and ordinance, to take all the property of plaintiff, upon its own determination of the necessity therefor, without a judicial hearing or determination as to said necessity, in contravention of the rights of plaintiff as guaranteed to it by Art. 1, Sec. 10 of the Constitution of the United States forbidding the enactment by the States of any law impairing the obligation of contracts; and also in contravention of the rights guaranteed to plaintiff by the 14th amendment to the Constitution of the United States securing to plaintiff the equal protection of the laws, and that its property shall not be taken without due process of law.

XXVII. That the appropriation made, proposed and threatened, of all of the said waters of the Cuyahoga River described in said Resolution and Ordinance, if unrestrained by this Court, will utterly destroy the property and franchises of plaintiff; that plaintiff will be forever prevented from carrying into effect the purposes and objects authorized by its articles of incorporation; and the large sums of money thus far expended by plaintiff to secure its said franchises and to construct its plant will be lost, and plaintiff will be cut off forever from exercising and enjoying its franchises and from utilizing and developing the water power of said river under its said development program, and from receiving the profits and gains
which it might reasonably be expected to earn; that the actual
92 loss in money and damages to plaintiff cannot be accurately estimated and determined and plaintiff will suffer irreparable damage.

XXVIII. That defendant is without right or power to divert the waters of the Cuyahoga River hereinbefore set forth in that said defendant is not located in and upon said Cuyahoga River and has no rights as a riparian owner on said river, except for the riparian use of its riparian lands, and said defendant has no right or power to divert any of the water of said river to the City of Akron for sale or otherwise.

XXIX. That defendant has no need to use the waters of the Cuyahoga River for any purpose whatever. That defendant is situated on the Little Cuyahoga River, the waters of which are available to the City of Akron, as a riparian owner, for the purposes of a municipal supply of water and are likewise adapted for that purpose; that the watershed of said Little Cuyahoga River is of sufficient area if properly developed with suitable storage reservoirs to furnish the entire supply of water needed by and for the City of Akron at this time and for many years in the future so far as those needs can now be anticipated.

XXX. That the defendant is also located upon the watershed of the Tuscarawas River; and that Summit Lake, so-called which is drained by the Tuscarawas River, is located within the municipal boundaries of the defendant city; that the Tuscarawas River has its sources in the southern portions of Summit County and the northern townships of Stark County and that its course through the County of Summit lies generally a few miles southerly of the City of Akron; that in addition to Summit Lake, aforesaid, Long Lake, Turkey-foot Lake and the Portage or Tuscarawas Reservoirs, so-called, are also connected with and on the watershed of the Tuscarawas
93 River and drained by that stream; that said lakes, aforesaid, have a combined area of not less than 32,000 acre feet and are sufficient with the watershed on which they are located, if properly developed, to furnish an abundant supply of water for the City of Akron and its inhabitants, not only for the present but also for all its reasonable future uses and requirements so far as those can be ascertained or reasonably anticipated. That defe-dant for many years last past has secured and now secures its entire municipal supply of water for itself and its inhabitants from said Summit Lake, taking there from an average of six million gallons of water per day; that the watershed of the Tuscarawas River easterly of the lakes and reservoirs aforesaid if suitably developed, would without said lakes and reservoirs, furnish a sufficient and abundant supply of water for said city and its inhabitants not only for the present but for all reasonable requirements in the future so far as those requirements can be anticipated; that said lakes and reservoirs and the watershed of the Tuscarawas River and the watershed of the Little Cuyahoga River aforesaid, are the natural, logical and reasonable sources of supply for a municipal supply of water for said city and are moreover fully available to it, and that the Cuyahoga River, at the point from which the defendant under the terms of said resolution and ordinance proposes to take and appropriate the waters of the Cuyahoga River is not a natural and reasonable source for a municipal supply of water for said defendant; but the point from which the defendant proposes to take the water of said Cuyahoga River is situate some twenty miles from the limits of said city and the water therefrom can only be brought to said city by diverting the same from its natural course and channel and not otherwise.

That plaintiff is informed, believes, and states the fact to be,
94 that the action of defendant in appropriating plaintiff's property herein and proposing to abandon its present source of water supply is in bad faith and fraud and is done pursuant to a conspiracy and at the dictation and in the interests of certain manufacturing interests, and certain owners of cottages used as a part of a summer resort, which are located upon the source of said present water supply and which have been and are now wrongfully polluting said present water supply. That said defendant's proper procedure in the premises is the pursuit of remedies against said private interests to prevent said pollution. That the refusal of defendant to protect its present supply and the attempt to confiscate the property of plaintiff already devoted to a public use is a fraud

upon the taxpayers of the City of Akron and upon plaintiff and the general public.

XXXI. That until on or about the 22nd day of March, 1912, The Akron Water Works Company, a private corporation, owned and operated a system of water works for the purpose of supplying the defendant and its inhabitants with a supply of water; that said supply was derived from said Summit Lake located within the corporate limits of defendant. That on or about the 22d day of March, 1912, defendant acquired by purchase from said The Akron Water Works Company at a cost of over $840,000.00 its entire water supply, plant and system, and since said date has been operating the same and supplying said City and its inhabitants with a supply of water derived from said Summit Lake aforesaid.

XXXII. That the defendant wholly disregarding and ignoring the plaintiff's rights in the premises and in violation and derogation thereof, has erected and is maintaining a reservoir on the Cuyahoga River, in the County of Portage at the place specified in the aforesaid resolution of May 27, 1912, and ordinance of August 26,
95 1913, and threatens to divert and upon information and belief is diverting at said point on the river a part —, and intends forthwith to divert all the water thereof, and carry the water so diverted by means of artificial conduits or channels into the City of Akron; that defendant does not intend to and cannot devote all the water of the Cuyahoga River to a public use, as it pretends to do by Resolution No. 3241 and Ordinance No. 3396 hereinbefore referred to. That in so far as defendant takes the water of any stream under color of statutes purporting to authorize proceedings in eminent domain, except for the purposes of domestic water supply it is taking private property for some other use than a public use, and such taking is done under the color of the authority of the acts of the Legislature of Ohio known as Section 3677, par. 13, and Section 3679, General Code of Ohio, and House Bill #357. That the average daily consumption of defendant of water for domestic purposes for the year 1910 was approximately 7,340,000 gallons.

That upon information and belief the estimated future population of Akron will be as follows:

Year.	Population.	Year.	Population.
1915.....	86,000	1935.....	173,000
1920.....	105,000	1940.....	200,000
1925.....	125,000	1945.....	229,000
1930.....	148,000	1950.....	260,000

That upon the above estimate as to probable growth and according to commonly accepted opinions as to use, the average daily consumption by the defendant city during the next 37 years will be as follows:

Year.	Gallons per day.
1915.....	8,600,000
1920.....	10,500,000
1925.....	12,500,000

1930	14,800,000
1935	17,300,000
1940	20,000,000
1945	22,900,000
1950	26,000,000

96 Plaintiff alleges that an appropriation by defendant of more than 20,000,000 of gallons per day is unreasonable and arbitrary and not for a public use; that the available flow of the Cuyahoga River is, under plans of plaintiff over 200,000,000 gallons per day. That pursuant to Resolution No. 3241 and Ordinance No. 3396 and House Bill No. 357 by the construction of said dam and reservoir hereinafter set forth defendant has taken for some other than a public use over 180,000,000 gallons of water per day, which has been devoted to a prior and paramount public use by plaintiff, such taking being in violation of the fundamental principle of free government that no private property shall be taken under power of eminent domain, except for a public use, and that property which has been devoted to a public use shall not be taken for an inferior or private use, and also in violation of Art. I, Sec. 19, of the Const., Ohio that private property shall ever remain inviolate but subservient to the public welfare.

XXXIII. That defendant has failed and refuses to compensate plaintiff for the properties, franchises and privileges taken by defendant; that it has made no provision, and is without power and authority to make any provision to compensate plaintiff for such taking and appropriation; that the requisite power and authority to compensate plaintiff cannot be obtained by defendant; that no proceedings to authorize payment to plaintiff can be taken except pursuant to the provisions of Art. XVIII of the Constitution of the State of Ohio; that said provisions regarding the issue of bonds by municipalities for acquisition of public utilities are not self-executing; that until additional legislation is secured empowering defendant to issue bonds for said purpose any proceedings taken by de-
97 fendant and any securities issued therefor are null and void; that defendant is unable to meet current expenses; that on the first day of November, 1912, at an election regularly held, the question of increasing the said tax rate was duly submitted to said electors and said increase was refused.

That the Mayor and Auditor of defendant, on or about Nov. 1st, 1912, issued a statement to the public that if said increase was not voted defendant could not meet its obligations. Copy of said statement is hereto attached for reference, and made a part hereof and marked "Exhibit D".

That a second proposition was submitted to the electors of the City of Akron to increase the tax levy on or about November 4, 1913, and such increase was again refused.

That after the sinking fund obligations of defendant are met, defendant has less than 40% of the average amount for the last five years necessary to pay cost of operation. That defendant has been without funds in the last sixty days to pay its ordinary unskilled

labor and such default has been in excess of $10,000. That the auditor of defendant estimates the deficit for the year 1914 at over $160,000.00. That the officers of defendant have repeatedly asserted defendant is bankrupt.

XXXIV. That defendant's acts and proceedings herein already had and threatened have already caused and will continue to cause plaintiff irreparable damage, and have cast a cloud upon the franchises, rights and title of plaintiff in said River.

XXXV. That the defendant is and at all times has been fully informed as to the rights of the plaintiff in the premises and is fully informed of plaintiff's franchises and property rights upon said river; yet notwithstanding, defendant wrongfully and
98 unlawfully seeks to ignore and destroy plaintiff's property rights and franchises in the premises and the value of its priority of said locations, and defendant plans and schemes to acquire property and rights in said river from certain riparian owners with the intent of defeating plaintiff's said franchises and priority of right, all to plaintiff's irreparable damage.

XXXVI. That all and each of the acts of defendant herein as above set forth, and each and singular, is in violation of the rights of plaintiff under the Constitution and laws of the United States and contrary to Section 10 of Article I, providing that no State shall pass any law impairing the obligation of contracts, and also of the Fourteenth Amendment of said Constitution guaranteeing the equal protection of the laws and that private property shall not be taken without due process of law.

XXXVII. That plaintiff has no adequate remedy at law.

Wherefore the plaintiff prays that the defendant, the City of Akron and its officers and agents be perpetually enjoined and restrained from constructing any dam or reservoir *or* the Cuyahoga River in the township of Franklin, County of Portage and State of Ohio; that it be enjoined and restrained from appropriating all or any of the waters of the Cuyahoga River at and above the line fixed as the axis of said proposed dam in the township of Franklin, County of Portage and State of Ohio, said line of proposed appropriation being approximately 1,200 feet northeast of the point where the Cleveland and Pittsburgh division of the Pennsylvania Railroad now crosses the Cuyahoga River and as particularly shown on a plan dated June, 1911, prepared by Frank H. Barber and Edward T. Bradbury; that the defendant be enjoined and restrained from appropriating to its use any of the waters of the tributaries of the Cuyahoga River at and above said proposed dam; that said defendant be further enjoined and restrained from diverting
99 either permanently or temporarily any of the water of the Cuyahoga River for the purpose of conveying the same to the City of Akron and that it be perpetually enjoined and restrained from diverting any of the water of said river out of said proposed reservoir for any purpose whatever.

And plaintiff further prays that during the pendency of this suit, a restraining order may be allowed temporarily restraining the defendant and its agents and officers from constructing and maintain-

ing any dam or reservoir on the Cuyahoga River and across the Cuyahoga River in the township of Franklin, County of Summit and State of Ohio, and particularly a proposed dam and reservoir shown on the plans of Frank H. Barber and Edward T. Bradbury, dated June, 1911, and located about 1,200 feet northeast of the point where the Cleveland and Pittsburgh Railroad now crosses the Cuyahoga River in said township of Franklin; that said City, its officers and agents be further temporarily restrained from appropriating any of the waters of the Cuyahoga River at and above the site of the said proposed dam and that said defendant, its agents and officers be temporarily enjoined and restrained from diverting any of the water of the Cuyahoga River or of any of its tributaries from and out of the natural channel of said river and out of said proposed dam for the purpose of permanently diverting the same from said river or for the purpose of carrying the same to the City of Akron.

Plaintiff prays further for other and additional relief in the premises as the facts of the case may show it is entitled to obtain in this cause.

XXXVIII. Plaintiff further prays that your Honors grant unto plaintiff a writ of subpœna ad respondendum issuing out of and under the seal of this Honorable Court, to be directed to the said defendants, commanding them and each of them, on a cer-
100 tain day and under a certain penalty, to be therein inserted, to appear before your Honors in this Honorable Court and then and there fully, true, direct and perfect answer make to all and singular the premises, and further to stand, do, perform and abide by such further order and decree as to your Honors may seem meet; and also that a writ of provisional injunction to the purport, tenor and effect, as hereinbefore set forth and appears, be granted during the pendency of this action.

And plaintiff will ever pray, etc.

THE CUYAHOGA RIVER POWER CO.,
By WILLARD R. KIMBALL, *President.*
CHAPMAN, HOWLAND & NIMAN,
PAUL HOWLAND,
Solicitors for Plaintiff.

MESSRS. DAVIES, AUERBACH & CORNELL,
32 *Nassau Street, Borough of Manhattan, New York;*
MESSRS. COLLIN, WELLS & HUGHES,
5 *Nassau Street, Borough of Manhattan, New York;*
HON. W. Z. DAVIS,
Harrison Building, Columbus, Ohio,
Of Counsel for Plaintiff.

101 Exhibit B is same as Exhibit B attached to Bill of Complaint. (See Page 45.)

102 UNITED STATES OF AMERICA,
Southern District of New York,
County of New York:

Willard R. Kimball, being duly sworn, says that he is the President of the Cuyahoga River Power Company of Ohio, the plaintiff named in the foregoing bill of complaint, and who has subscribed the same; and that the same is true to his own knowledge, except as to the matters therein states to be alleged upon information and belief, and that, as to those matters, he believes it to be true.

Sworn to before me this 15th January, 1914.

[SEAL.] H. H. APPLEGATE,
Notary Public, New York County. [SEAL.]

103 Exhibit C is same as Exhibit C attached to Bill of Complaint. (See page 46.)

104 EXHIBIT D.

"It will be seen from the above that there has been a gradual increase in the amount of expenditures exclusive of the Sinking Fund in each of the years covered by this statement. In 1911 the increase was more than for the other years, and is accounted for by the fact that there was an increase in the salaries of police and firemen, and the balance of it is to be accounted for by the unusual growth of the city. The following statement will show the amount collected for taxes:

Total including Sinking Fund, 1909, $432,839.47; Sinking Fund, $131,659.00; net for general purposes, $301,180.47.

Total including Sinking Fund, 1910, $390,015.56; Sinking Fund, $135,422.00; net for general purposes, $264.593.56.

Total including Sinking Fund, 1911, $428,586.68; Sinking Fund, $95,241.00; net for general purposes, $333,345.68.

Total including Sinking Fund, 1912, $435,807.64; Sinking Fund, $200,774.27; net for general purposes, $235,033.37.

It will be seen from this statement that the city received from the collection of taxes for purposes other than the Sinking Fund for the current year a smaller amount than for any of the other years. The difference between the amount expended and that shown as received from taxes is accounted for by the fact that the city has other resources of revenue. Dow taxes, licenses, fines, building permits, etc.

The budget for 1913 show- that it is necessary to raise by taxation for general purposes, $369,921.00; for sinking fund purposes, $308,050.00; total $677,971.00.

"The amount which it will be possible to collect from taxation is estimated at $495,860.00, leaving a shortage of $182,111.00.

105 The amount required by the Sinking Fund Commission cannot be reduced, and ought not to be reduced because it is to provide for the financial obligations of the city, which would either have to be refunded or go to protest if the means are not

provided for paying them. Deducting what the Sinking Fund requires from the total amount that may be collected, leaves $187,810.00 that we may realize for general purposes or only about one-half the amount necessary.

"The situation is, therefore, that if the election does not carry, the city will become bankrupt, and business will have to be suspended, or police force, fire department, and other departments reduced in efficiency.

"Akron has 176 miles of street, 88 miles of which are paved. There are numerous sewers, both of which are a source of constant expense. The Service Department has never had the money to keep them in repair as the people desire them to be kept, and economy will have to be practiced if this additional levy is granted, but if granted, it is hoped that it will put the department in shape to do at least as well, if not better than, it has done in the past.

"Many streets are in bad condition. Repairs are made to the extent that the means provided will allow. It has been impossible to make all the repairs when needed, nor could it be done unless money is provided. We also call attention to the fact that the Sinking Fund Commission requires $103,000.00 more for 1913 than was required for 1912; that there has been bonds issued to the amount of $2,000,000.00 for improved water works, the interest on which must be paid. It is estimated that the revenue from the water works, with the present facilities, will take care of about one-half of this interest, and provide a Sinking Fund, but the balance must be provided for by taxation.

Respectfully submitted,

FRANK W. ROCKWELL, *Mayor.*
JAMES McCAUSLAND,
City Auditor."

106 (*Motion to Dismiss. Filed March* 2, 1915.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 192. Equity.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
vs.
THE CITY OF AKRON, a Municipal Corporation, Defendant.

Motion to Dismiss.

Now comes City of Akron, the defendant in the above entitled cause and moves that the plaintiff's first amended bill of complaint be dismissed and for causes therefor sets forth the following:

1. Because it does not appear in the allegations contained in the plaintiff's bill of complaint that this court has jurisdiction of this cause.

2. Because it does not appear in the plaintiff's bill of complaint that said cause arises under the Constitution and laws of the United States.

3. Because the bill of complaint states no cause of action entitling the plaintiff to relief in equity.

4. Because it does not appear from the plaintiff's bill of complaint that the plaintiff has any interest in the subject matter thereof.

5. Because it does not appear from the plaintiff's bill of complaint that the plaintiff has any interest in the subject matter thereof affected by any acts committed or threatened by the defendant.

6. Because is appears from the allegations in the plaintiff's
107 bill of complaint that the plaintiff has a full, complete and adequate remedy at law.

By its Solicitor.

JONATHAN TAYLOR.

UNITED STATES OF AMERICA,
Northern District of Ohio,
County of Summit, State of Ohio:

I, Jonathan Taylor, City Solicitor of the defendant, the City of Akron, hereby certify that the foregoing motion is not interposed for delay and that in my opinion the same is well founded in law and presents a fit subject for judicial inquiry and decision.

JONATHAN TAYLOR.

Subscribed and sworn to this 28 day of February 1914.
Before me,
[SEAL.]

ERWIN J. SHOOK,
Notary Public.

108 (*Memorandum Opinion. Filed June* 19, 1914.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 192. Equity.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
vs.
THE CITY OF AKRON, a Municipal Corporation, Defendant.

Memorandum.

KILLITS, *J.:*

The defendant moves to dismiss the first amended complaint in this case principally upon a challenge to the jurisdiction of the court and the claim that no federal question is involved. A similar motion to the complaint was granted by Judge Day and an opinion filed in this case. In Judge Day's conclusions we fully concur and find

nothing by way of amendment to the complaint which avoids the force thereof. The motion, therefore, should be and is granted and the second amended complaint dismissed.

June 17, 1914.

JOHN M. KILLITS, *Judge.*

109 (*Order Dismissing First Amended Bill of Complaint. Entered July 7th,* 1914, *by Judge Killits.*)

No. 192. Equity.

THE CUYAHOGA RIVER POWER COMPANY
vs.
THE CITY OF AKRON, a Municipal Corporation.

This cause coming on to be heard at this term of court, upon the first amended bill of complaint, and upon the motion of the defendant, to dismiss the first amended bill of complaint, and having been argued by counsel and submitted to the court, the court being fully advised in the premises, finds that the said motion to dismiss is well taken and the same is hereby sustained, and it is therefore ordered, adjudged and decreed that the said first amended bill of complaint be and the same is hereby dismissed, and the injunction prayed for therein be and the same is hereby denied, and that the defendant recover of the plaintiff the costs herein to be taxed, to all of which the said plaintiff excepts and hereby gives notice of its intention to appeal this cause from this court to the Supreme Court of the United States.

110 (*Certificate of Judge. Filed Jul-* 7, 1914.)

District Court of the United States, Northern District of Ohio, Eastern Division.

No. 192. Equity.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
vs.
THE CITY OF AKRON, a Municipal Corporation, Defendant.

Motion to Dismiss First Amended Bill of Complaint.

Certificate of Judge.

In this cause I hereby certify that the order of dismissal herein made is based solely on the ground that no Federal question was involved, and that the First Amended Bill of Complaint, in my opinion, disclosed the infraction of no right arising under or out of the Federal laws or constitution; and that treating the motion to dismiss said amended complaint as presenting this question of juris-

diction, and acting also independently of said motion to dismiss, and upon the Court's own motion, the suit is dismissed only for the reasons above stated; that is, that the controversy not arising under the laws and Constitution of the United States, there is consequently no jurisdiction of the District Court of the United States.

This certificate is made conformably to Act of Congress of March 3, 1911, known as the Judiciary Act and the opinion filed herein is made a part of the record and will be certified and sent up as a part of the proceedings, together with this certificate.

The 7th day of July A. D. 1914.

JOHN M. KILLITS,
District Judge, Holding District Court for the Northern District of Ohio, Eastern Division.

111 (*Notice of Appeal and Allowance Thereof. Filed April 27, 1915.*)

District Court of the United States, Northern District of Ohio, Eastern Division.

No. 192. Equity.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff-Appellant,
vs.
THE CITY OF AKRON, a Municipal Corporation, Defendant-Respondent.

Notice of Appeal and Allowance Thereof.

The above named plaintiff, The Cuyahoga River Power Company, considering itself aggrieved by the order entered on July 7, 1914, in the above entitled proceeding, doth hereby appeal from said order to the Supreme Court of the United States, and it prays that this its appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was duly authenticated may be sent to the Supreme Court of the United States.

COLLIN, WELLS & HUGHES,
Solicitors for Plaintiff-Appellant.

Office and Post Office Address: 5 Nassau Street, Borough of Manhattan, New York City.

CLEVELAND, OHIO, April 27, 1915.

And now, to-wit, on April 27, 1915, it is ordered, that the appeal be allowed as prayed for. Bond fixed in the sum of $250.00.

JOHN H. CLARKE,
District Judge.

112 (*Assignment of Errors. Filed Apr.* 27, 1915.)

District Court of the United States, Northern District of Ohio, Eastern Division.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff-Appellant,
against
THE CITY OF AKRON, a Municipal Corporation, Defendant-Respondent.

Assignment of Errors.

Now comes the plaintiff above named, The Cuyahoga River Power Company, by its solicitors and presents with its accompanying petition for appeal from the decree entered herein on the 7th day of July, 1914, the following assignments of error upon which it will rely upon its appeal from said decree, to-wit:

I. The Court erred in holding that it appears on the face of the bill of complaint herein that this suit does not involve any question arising under the Constitution or laws of the United States.

II. The Court erred in granting the defendant's motion to dismiss the bill of complaint herein for want of jurisdiction.

III. The Court erred in not holding that it appears upon the face of the bill of complaint herein that this is a suit arising under the Constitution of the United States.

113 IV. The Court erred in not denying the defendant's motion to dismiss the bill of complaint herein for want of jurisdiction.

V. The Court erred in refusing to hold that the bill of complaint having alleged the existence of valid franchise rights and of a contract between the plaintiff and the State of Ohio and the impairment of such contract and deprivation of its property without due process of law, a Federal question was presented by the bill so as to give the Court jurisdiction.

VI. The Court erred in not holding that the plaintiff by virtue of its due incorporation, adoption of location and maps and commencement of condemnation proceedings to acquire physical property, had acquired an interest in and vested rights to the lands described in its resolutions of location and in the waters of the Cuyahoga River appurtenant thereto, of which it could not be deprived without due process of law.

VII. The Court erred in holding that property consists only of tangible things.

VIII. The Court erred in holding that the title of the private owner is superior to the title of the State.

IX. The Court erred in holding the right of Eminent Domain was not vested in plaintiff by contract with the State and without the consent of the private owner.

X. The Court erred in holding that no rights vested in plaintiff

until the title of the private owner had been acquired by condemnation or purchase.

XI. The Court erred in holding that the private owner does
114 not hold his title subservient to the public welfare and conditioned upon the exercise thereof by the State or its delegate.

XII. The Court erred in holding plaintiff was not substituted to and the assignee of all the rights of the State in The Cuyahoga River for a public use.

XIII. The Court erred in not holding that plaintiff was in constructive possession of the Cuyahoga River after June 4, 1908, and entitled to such actual possession as would not interfere with the rights of the private owner.

XIV. The Court erred in holding that plaintiff acquired no vested right when it entered upon and surveyed the land and water rights included in the right of way described in its charter; in adopting its locations thereon, in making offers to purchase and in filing condemnation suits.

XV. The Court erred in holding the rule of lis pendens does not apply to defendant.

XVI. The Court erred in holding that rights appurtenant to physical property may not be taken by defendant prior to actual physical occupancy of such property.

XVII. The Court erred in holding that because there was no actual physical occupancy by plaintiff of real estate by virtue of a private title, therefore there was no taking of said franchises of plaintiff by defendant.

XVIII. The Court erred in not holding that Section 3677, Paragraph 13, Ohio General Code, together with Section 3679, purport to convey both legislative and judicial powers to defendant in
115 violation of Article I, Section 16, Ohio Constitution, and so permits a taking of private property for either a private use or without reference to necessary public use, and therefore *is* in violation of Article XIV, Section 1, United States Constitution.

XIX. The Court erred in not holding that all statutory authority of defendant was repealed November 15, 1912, by Article XVIII, Ohio Constitution, and that said Article was not self-executing and that therefore defendant, since November 15, 1912, has been without statutory authority to proceed to acquire property by eminent domain for water supply.

XX. The Court erred in not holding that the pretended resolution #3241 and Ordinance #3396, adopted by defendant, were void and of no effect, because their purport and intent was to authorize a taking of the property of this plaintiff without compensation and at a time when the defendant was without means or authority to make such compensation.

XXI. The Court erred in not holding that the proceeding of defendant pursuant to a resolution and ordinance enacted under color of state laws, valid on their face but in law void, the effect of which was to take and destroy plaintiff's property without compensation, was in contravention of Article I, Section 10, and Article XIV, Section 1, of the Constitution of the United States.

XXII. The Court erred in holding that defendant could appropriate property for a public use without making a description thereof and that ordinance #3396 contained a precise description as required by statute of the property to be taken.

116 XXIII. The Court erred in holding that ordinance of defendant, #3396, was notice to plaintiff.

XXIV. The Court erred in holding that ordinance #3396 could authorize defendant to take property for a public use after the repeal of the statute, G. C. 3677, Par. 13, and #3679.

XXV. The Court erred in not holding that if the statutes #3677, Paragraph 13, and #3679, are not repealed, that said statutes are not limited by Article XVIII, Ohio Constitution, in that the extent of the appropriation is not within the discretion of the common council but may not exceed 50% of the public use of defendant.

XXVI. The Court erred in not holding that Article XVIII, Ohio Constitution does violate Article XIV, Section 1, Constitution of the United States, in that in express terms it assumes to authorize an appropriation of 50% more than the public use.

XXVII. The Court erred in not holding that Article XVIII, Ohio Constitution, violates Article XIV, Section I, United States Constitution, in that it permits property taken for a public use to be sold without restriction as to use and so permits the property of plaintiff, devoted to a public use, to be taken for a private use.

XXVIII. The Court erred in not holding that Article I, Section 19, Ohio Constitution, is a limitation upon the right of defendant to issue bonds for public utilities, and therefore defendant is without power to pay for any property taken for a private use or for hoarding.

117 XXIX. The Court erred in holding that a manifest and gross abuse of power by defendant in taking property for a public use may not be reviewed by the courts.

XXX. The Court erred in holding that defendant is the sole judge of the necessity of taking property for a public use when the exercise of its discretion is founded upon bad faith and fraud, and the taking of property is pursuant to a conspiracy.

XXXI. The Court erred in holding that the present water supply of defendant is not adequate to its needs.

XXXII. The Court erred in holding that defendant may take the property of plaintiff, devoted to a public use, in order that defendant or its citizens may pollute its present water supply.

XXXIII. The Court erred in holding that the right of the manufacturing interests of defendant to pollute its present water supply is paramount to the right of plaintiff to devote the waters of the Cuyahoga River to a public use.

XXXIV. The Court erred in refusing to hold that the franchise and rights acquired by the plaintiff constitute a contract and a right of property protected by the Constitution of the United States and not subject to be destroyed without compensation by the act of a subordinate municipal division of the State of Ohio.

XXXV. The Court erred in refusing to hold that the acts and proceedings of the defendant done and carried on under color and

authority of state laws and municipal ordinances constitute
118 an impairment of plaintiff's contract with the State of Ohio and the taking of its property without due process of law.

XXXVI. The Court erred in holding that the power alleged to be conferred upon defendant by Section 3677, Par. 13, to appropriate "private property or any right or interest therein" according to the statute of appropriation implies an alteration or repeal of the charter and contract rights of plaintiff.

XXXVII. The Court erred in not denying the motion to dismiss the bill of complaint for want of jurisdiction, because it appears from the bill of complaint that the plaintiff's claims as set forth therein are well founded in point of law and entitle it to relief.

XXXVIII. The Court erred in not denying the motion to dismiss the bill of complaint for want of jurisdiction, because the suit obviously does really and substantially involve a dispute or controversy as to a right which depends upon the construction of the Constitution of the United States.

Wherefore and for divers other reasons upon which the said decree was entered, the plaintiff prays that said decree may be reversed, and that the District Court of the United States for the Northern District of Ohio be directed by the mandate of the Supreme Court of the United States to enter a decree denying the defendant's motion to dismiss the bill of complaint for want of jurisdiction, and adjudging that it appears upon the face of the bill of complaint herein that this suit arises under the Constitution
119 of the United States, and for such other and further and general relief as to the Court may seem proper.

Dated New York, April 25, 1915.

COLLIN, WELLS & HUGHES,
Solicitor- for Plaintiff.

Office and Post Office Address: 5 Nassau Street, Borough of Manhattan, City of New York.

120 (*Order Allowing Appeal, Entered April 27th, 1915, by Judge Clarke.*)

No. 192. Equity.

THE CUYAHOGA RIVER POWER CO.
vs.
THE CITY OF AKRON.

On motion of Messrs. Collin, Wells & Hughes, solicitors and of counsel for plaintiff, it is ordered that an appeal to the United States Supreme Court, from the decree heretofore filed and entered herein on the 7th day of July, 1914, be and the same hereby is allowed; and that a certified transcript of the record in accordance with the rules of practice of the courts of equity of the United States, as

promulgated by the Supreme Court of the United States, November 4th, 1912, be forthwith transmitted to said United States Supreme Court.

It is further ordered that the bond on appeal be fixed in the sum of Two Hundred and Fifty Dollars ($250.00).

121 (*Bond on Appeal, Filed Apr.* 27, 1915.)

Know all men by these presents, That we The Cuyahoga River Power Company, of Cleveland, Ohio, as principal, and National Surety Company a corporation of New York, of New York, N. Y., as surety, are held and firmly bound unto The City of Akron, a Municipal Corporation, in the full and just sum of Two Hundred and Fifty ($250.00) Dollars to be paid to the said The City of Akron its certain attorneys, executors, administrators, successors or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 27th day of April in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a session of the District Court of the United States for the Eastern Division of the Northern District of Ohio, in a suit pending in said Court, between The Cuyahoga River Power Company versus the City of Akron, a Municipal Corporation, a judgment was rendered against the said The Cuyahoga River Power Company and the said The Cuyahoga River Power Company having obtained an appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the City of Akron citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, on the — day of —— next.

Now the condition of the above obligation is such, That if the said The Cuyahoga River Power Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

122 NATIONAL SURETY COMPANY,
By C. R. LAURENSON,
Attorney-in-Fact.

Sealed and Delivered in Presence of
—— ——.
—— ——.

Approved by
[SEAL.] JOHN H. CLARKE,
United States District Judge.

123 District Court of the United States, Northern District of Ohio, Eastern Division.

No. 192.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff-Appellant,
against
THE CITY OF AKRON, a Municipal Corporation, Defendant-Respondent.

Citation.

UNITED STATES OF AMERICA, *ss:*

To the City of Akron, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at Washington, D. C., on the first Monday of June, 1915, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Northern District of Ohio, Eastern Division, wherein The Cuyahoga River Power Company is appellant and The City of Akron is respondent, to show cause, if any there be, why the order in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 27th day of April in the year of our Lord One thousand nine hundred and fifteen.

JOHN H. CLARKE,
District Judge.

124 UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

U. S. Marshal's Return.

Received this writ at Cleveland, Ohio, April 29th, 1915, and on the same day at Akron, Ohio, I served it on the said city of Akron, by delivering to F. W. Rockwell, Mayor, a true and certified copy hereof, with all endorsements thereon.

CHARLES W. LAPP,
U. S. Marshal,

By T. E. WALSH,
Deputy Marshal.

Marshal's Fees.

Service	$2.00
Travel	2.40
	$4.40

Filed May 3, 1915, at — o'clock — M. B. C. Miller, Clerk U. S. District Court, N. D. O.

25 (*Stipulation as to Record. Filed May* 10, 1915.)

istrict Court of the United States, Northern District of Ohio, Eastern Division.

No. 192.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff-Appellant,
against
THE CITY OF AKRON, a Municipal Corporation, Defendant-Respondent.

Stipulation as to Record.

It is hereby conceded that the subpœna to answer the first amended ill of complaint herein was duly issued and served within the orthern District of Ohio, Eastern Division, upon the defendant bove named, and that said defendant duly appeared and moved to ismiss said bill; and

It is hereby Stipulated that upon the appeal taken by the plaintiff from the decree dismissing the first amended bill of complaint erein for want of jurisdiction the following portions of the record erein shall constitute the transcript of record to be transmitted to he Supreme Court of the United States, viz:

1. Bill of Complaint and exhibits thereto annexed.
2. Motion to dismiss for want of jurisdiction filed August 4, 1913, nd notice thereof.
3. Final Decree dated —— —, ——, and Journal entry.
4. First Amended Bill of complaint and exhibits thereto anexed.
5. Defendant's motion to dismiss for want of jurisdiction and the otice thereof.
6. Final decree dated July 7, 1914.
7. Petition for allowance of appeal.
8. Assignment of errors.
26 9. Certificate on question of jurisdiction.
10. Citation on appeal with admission of service thereto nnexed.

COLLIN, WELLS & HUGHES,
Solicitor- for Plaintiff.

Office and Post Office Address, 5 Nassau Street, Borough of Manattan, New York City.

—— ——, *Solicitor for Defendant.*

Office and Post Office Address, City Hall, Akron, Summit County, Ohio.

I hereby certify that on the 8th day of May, 1915, at 11:15 A. M., I served the above "stipulation as to record" on Jonathan Taylor, City Solicitor of the City of Akron, Ohio, and Attorney for the within named defendant, the City of Akron, by delivering to him personally a true copy thereof.

Witness my hand the day and year above written.

H. L. BEATTY.

127 (*Precipe for Transcript. Filed May* 10, 1915.)

District Court of the United States, Northern District of Ohio, Eastern Division.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff-Appellant,
against
THE CITY OF AKRON, a Municipal Corporation, Defendant-Respondent.

Precipe.

To the clerk:

You are requested to make a transcript of record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, but no other papers or exhibits, to wit:

1. Bill of Complaint and exhibits thereto annexed.
2. Motion to dismiss for want of jurisdiction filed August 4, 1913, and notice thereof.
3. Final Decree dated February 13, 1914, and Journal entry.
4. First Amended Bill of Complaint and exhibits thereto annexed.
5. Defendant's motion to dismiss for want of jurisdiction and the notice thereof.
6. Final Decree dated July 7, 1914.
7. Petition for allowance of appeal.
8. Assignment of errors.
9. Certificate on question of jurisdiction.
10. Citation on appeal with admission of service thereto
128 annexed.
11. Stipulation as to record.

COLLIN, WELLS & HUGHES,
Solicitors for Plaintiff.

Office and Post Office Address, 5 Nassau Street, Borough of Manhattan, New York City.

129 In the District Court of the United States, Northern District of Ohio, Eastern Division.

No. 192. Equity.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
vs.
THE CITY OF AKRON, a Municipal Corporation, Defendant.

NORTHERN DISTRICT OF OHIO, *ss:*

I, B. C. Miller, Clerk of the District Court of the United States for said District, do hereby certify that the annexed and foregoing pages, contain a full, true and complete copy of the pleadings and exhibits, in the above entitled cause, as specified in the precipe for transcript, filed by the appellant, The Cuyahoga River Power Company, including the notice of appeal, assignment of errors, order allowing appeal and bond on appeal, and true copies of the opinions of the court therein filed.

There is also annexed hereto and transmitted herewith, the original citation issued and allowed in this cause.

In testimony whereof, I have hereunto signed my name and affixed the seal of said Court at Cleveland in said District, this 11th day of May, A. D., 1915, and in the 139th year of the Independence of the United States of America.

[Seal of the District Court, Northern Dist. of Ohio.]

B. C. MILLER, *Clerk,*
By R. C. DEAN,
Deputy Clerk.

Endorsed on cover: File No. 24,729. N. Ohio D. C. U. S. Term No. 985. The Cuyahoga River Power Company, appellant, vs. The City of Akron. Filed May 15th, 1915. File No. 24,729.

SUPREME COURT OF THE UNITED STATES.

October Term, 1916. No. 485

THE CUYAHOGA RIVER POWER COMPANY,
Appellant,

against

THE CITY OF AKRON,
Appellee.

MOTION TO ADVANCE.

CHARLES A. COLLIN,
Counsel for Appellant,
120 Broadway,
New York City.

ARMAN PRINTING COMPANY, New York

Supreme Court of the United States.

October Term 1914, No. 985.

THE CUYAHOGA RIVER POWER COMPANY,
Appellant,

against

THE CITY OF AKRON,
Appellee.

Motion to Advance.

Now comes the appellant above named and moves the Court to advance this cause and set the same down for forty-five minute argument as provided in Rule 32 and Subdivision 3 of Rule 22, or, in the alternative, if that relief cannot be had, then that the case be transferred to the summary docket for hearing as provided in Rule 32 and Subdivision 6 of Rule 6.

The following is a brief statement of the facts and matter involved and of the reasons for the application:

This cause comes to this Court on appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division, and the only question in issue is the question of the jurisdiction of the Court below.

The suit was brought to enjoin the appellee

from taking the appellant's property without compensation in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, the bill alleging, also, that the acts complained of are being done under color of authority of State laws, though in truth without any legal authority whatever, and amount to an impairment of the obligations of the appellant's contracts with the State of Ohio (*i. e.*, grants of franchises to the appellant) in violation of Section 10 of Article I of the United States Constitution. All the parties are citizens of Ohio and, as expressly stated in the bill, the suit arises under the Constitution of the United States and the jurisdiction of the District Court was invoked upon that ground for the purpose of protecting and enforcing the appellant's rights under said Constitution.

The appellee moved to dismiss the bill for want of jurisdiction upon the ground that it does not appear that the cause arises under the Constitution or laws of the United States. The District Court granted this motion and entered a final decree dismissing the bill for want of jurisdiction. In connection with the allowance of this appeal from that decree, the District Court has certified that its jurisdiction is in issue and that the suit was dismissed solely because *"the controversy not arising under the laws and Constitution of the United States, there is consequently no jurisdiction of the District Court of the United States."*

The injunction asked for herein is to restrain the appellee from diverting the waters of the Cuyahoga River under an ordinance of the City Council, by which said Council purports to appropriate "all the waters of the Cuyahoga River at

and above a line heretofore fixed as the axis of a proposed dam to be built by said city in the Township of Franklin, County of Portage and State aforesaid." The waters of said river are subject to a prior appropriation, by plaintiff, under a statute declared valid by the Supreme Court of the State, for a conflicting public use, and important parts of said river, were, at the time of the enactment of said ordinance, and are now, subject to condemnation proceedings pending in the courts. The diversion contemplated by the appellee would utterly destroy the property and franchises of the appellant, and there is great danger that such diversion may commence and the appellant be irreparably injured before the case can be heard in regular order.

It being apparent from the foregoing statement that the case here involves solely the jurisdiction of the Court below, and that it is important for the appellant's protection that a speedy decision be made, we ask that the case be advanced as requested above.

Respectfully submitted,

CHARLES A. COLLIN,
Counsel for Appellant.

Notice of Motion to Advance.

Sir:

Please take notice that the appellant, The Cuyahoga River Power Company, will submit the foregoing motion to advance to the Supreme Court of the United States at a stated term thereof on

Tuesday, June 1st, 1915, at the Capitol in the City of Washington, D. C., at the opening of the Court on that day, or as soon thereafter as counsel can be heard.

Yours, etc.,

CHARLES A. COLLIN,
Counsel for Appellant,
120 Broadway,
New York, N. Y.

To
Charles F. Choate, Jr., Esq.,
Counsel for Appellee,
30 State Street,
Boston, Mass.

7

SUPREME COURT OF THE UNITED STATES.

October Term, 1914, No. 465.

THE CUYAHOGA RIVER POWER COMPANY,
Appellant,

against

THE CITY OF AKRON,
Appellee.

Appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division.

REPLY BRIEF FOR APPELLANT.

CHARLES A. COLLIN,
Counsel for Appellant,
120 Broadway,
New York.

To be argued by
CARROLL G. WALTER.

APPEAL PRINTING COMPANY, New York

SUBJECT INDEX.

CASES CITED.

Supreme Court of the United States.

OCTOBER TERM, 1915.

THE CUYAHOGA RIVER POWER COMPANY, Appellant, v. THE CITY OF AKRON, Appellee.	No. 465.

Appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division.

REPLY BRIEF FOR THE APPELLANT.

Statement.

The facts admitted make the question here very simple, and confer jurisdiction, under either the contract, or the due process clauses of the Constitution. The discussion by appellee, of what rights it might have had, if the charter of appellant had been repealed by the *State of Ohio*, and of cases where the taking has been pursuant to the police power, or by competition, but, not within the express terms of a prior grant, and also whether appellant has taken property of the Western Reserve Water Company without compensation, etc., is irrelevant.

Under the Ohio laws a municipal corporation is under no more obligation to proceed with a water

supply plant than is a power company with its purposes, but is so restricted in borrowing money that the statute wisely gives it six months within which to elect as to the acceptance of property appropriated.

It is alleged in the bill Akron is insolvent and cannot pay for the property of appellant.

A private eminent domain corporation is under no such restriction, but is under an "implied" obligation to proceed (N. Y. E. L. Lines Co. *v.* Empire Subway Co., U. S. Adv. Ops 1914, 72), and must elect concerning an appropriation within sixty days. Nevertheless its charter is a contract and its rights and franchises are protected by the constitutions.

Facts.

Under the following statutory power of eminent domain the City of Akron has taken appellant's property without compensation (and has also impaired the obligation of the charter contract).

> "G. C. 3677. 13. For providing for a supply of water for itself and its inhabitants by the construction of wells, pumps, cisterns, aqueducts, water pipes, dams, reservoirs, reservoir sites and water works, and for the protection thereof; and to provide for a supply of water for itself and its inhabitants, any municipal corpo tion may appropriate property within or without the limits of the corporation; and for this purpose any such municipal corporation may appropriate in the manner provided in this chapter, any property or right or interest therein, theretofore acquired by any private corporation for any purpose by appropriation proceedings or otherwise. Either party to such appropriation proceedings shall have

> the same right to a change of venue as is now given by law in the trial of civil actions."

The power of Akron is to *appropriate* or "take" under the Constitution and Statute, and nothing else.

Appellee admits the due incorporation of appellant for another public use, under a valid statute, which makes appellant a common carrier and confers the steam railroad right of appropriation; the location by specific surveys, of the property required for its plant; the commencement of condemnation proceedings, and that such proceedings are now pending. The lower Court held, and appellee admits, the right of appellant "to proceed with its corporate purposes on the location selected by it."

As two bodies cannot occupy the same space at the same time, the "right to proceed," if it is a right, must be exclusive, and is so considered by the State Court (Henry *v.* Trustees of Perry Township, 48 O. S., 671, 30 N. E., 1122). It is a right to a place. Such a right, created by contract is and must be exclusive, or there is not a true contract. Therefore, "the right to proceed" on the Cuyahoga River was exclusive, as a matter of fact, and not merely of law. This right was appurtenant to the several parcels of real estate comprising the *location* of this public service corporation. The State Courts have held that such a location of a right of way for a common carrier is a property right. It is inconceivable it should be otherwise.

> Plank Road *v.* Lane, 2 O. S., 420.
> Junction R. Co. *v.* Ruggles, 7 O. S., p. 1.
> Hamilton G. & C. Tr. Co. *v.* Hamilton, etc., 69 O. S., 402.

See, also:

> Cleveland *v.* Cleveland City Ry. Co., 194 U. S., 517.

By location, the public use of the waters of the Cuyahoga River for the production of hydro-electric power, was duly conveyed by the State and accepted by appellant, and was then a vested right to the said use, and was, and now is, "property."

> Little Miami Light, Heat & Power Co. *v.* John T. White *et al.*, 77 O. S., 633. (See the Opinion in full, Appendix I, p. 78, Main Brief).

The Law.

The Ohio Constitution provides, Article I, Section 19:

> "Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war, or other public exigency imperatively requiring its immediate seizure or for the purposes of making or repairing roads, which shall be open to the public without charge, a compensation shall be made to the owner, in money, and in all other cases where private property shall be taken for public use a compensation therefor shall *first* be made in money, or *first* secured by a deposit of money, and such compensation shall be assessed by a jury without deduction for benefits to any property of the owner."

The word "property" has been construed or defined in practically the same terms by both this Court and the Ohio Courts. In short, the word means the *use* of *things*. It is a creature of law, and not of nature. The term is subjective, not objective, and includes every valuable right a

person or corporation may have. It follows, therefore that the right of appellant "to proceed with its corporate purposes" upon a given location is a property right, or "bundle of rights," of which it has been deprived. Its "property," has been taken. A "taking" under the Ohio decisions includes not only a physical seizure, but any interference with a right. The facts well pleaded in the bill are that appellee has taken possession of the right of way of appellant and has interfered with the execution of every corporate franchise and purpose, thereby denying the "right to proceed." The State decisions, some of which are cited in appellant's main brief, are that such an interference with a use, or right, is a taking and entitles the owner to compensation and such is the express language of the Ohio Constitution. It is clear, therefore, that appellant would have a remedy in the State Courts.

The Question of Jurisdiction.

The 14th Amendment provides that no (1) State, shall (2) *deprive* any person of (3) *property*, without (4) *due process of law*.

(1) Although only a subordinate division thereof, Akron is the "State" using the word in the larger sense. It is a repository of the State power.

> Link *v.* Karb, 104 N. E., page 632, at page 635.
>
> Cleveland *v.* Cleveland City Ry. Co., 194 U. S., 516, 518.
>
> Home Telephone Co. *v.* The City of Los Angeles, 227 U. S., 278.

(2) The word "deprive" in the 14th Amendment

has the same meaning as "take" in the Ohio Constitution.

(3) It is among the reserved rights of the States to determine property laws and therefore the word "property" has, in this case, the same meaning in both constitutional provisions. As above stated, the admissions of appellee constitute an admission that appellant has property, and such is the holding of this Court. The right of way of a common carrier is "property," independently of the fee.

> United States *v.* Jones, 109 U. S., 518.
> New Mexico *v.* U. S. Trust Co., 172 U. S., 717.
> Cleveland *v.* Cleveland City Ry. Co., 194 U. S., 517.
> W. U. Tel. Co. *v.* Penna. R. Co., 195 U. S., 495.
> Denver & Rio Grande R. R. Co. *v.* Arizona, etc., R. R., 233 U. S., 601.
> Minidoka & Southwestern R. R. *v.* U. S., U. S. Adv. Ops., 1914, page 46, holding that the location of a railroad, upon the mere location of a settler of public lands, was property, which the Government could not disturb for an irrigation project.

(4) Due process of law requires notice (Cooley, Const. Lim., 403; Pennoyer *v.* Neff, 95 U. S., 714; United States *v.* Jones, 109 U. S., 513), a taking limited to the public use (Kaukauna Water Power Co. *v.* Green Bay & M. Canal Co., 142 U. S., 254; Buckingham *v.* Smith, 10 O. S., 238; Railway *v.* Cumminsville, 14 O. S., 523), and compensation pursuant to the law of the State (Con-

solidated Turnpike Co. *v.* Norfolk, etc., Ry. Co., 228 U. S., 326, 330; Appleby *v.* Buffalo, 221 U. S., 524; Chicago B. & Q. R. R. Co. *v.* Chicago, 166 U. S., 226; Brand *et al. v.* Union Elevated Ry. Co., U. S. Adv. Ops., 1914, p. 846; Hatch *v.* Railway Co., 18 O. S., 92; Cincinnati *v.* Railroad Co., 88 O. S., at p. 294).

A failure of either of these essentials in eminent domain proceedings, has been uniformly held, by this Court, to confer jurisdiction. Appellant has not had notice, or compensation, and at least nine-tenths of its property is taken for a private use.

Conclusion.

The State of Ohio (Akron), has deprived appellant of its property without due process of law.

The decree should be reversed.

Respectfully submitted,

CHARLES A. COLLIN,
Solicitor for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 465.

THE CUYAHOGA RIVER POWER CO., *Appellant,*

vs.

THE CITY OF AKRON, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

APPELLANT'S REPLY BRIEF.

WADE H. ELLIS,
Attorney for Appellant.

R. GOLDEN DONALDSON,
CHARLES A. COLLIN,
CARROLL G. WALTER,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

TABLE OF CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 465.

THE CUYAHOGA RIVER POWER CO., *Appellant*,

vs.

THE CITY OF AKRON, *Appellee*.

APPELLANT'S REPLY BRIEF.

This case presents a comparatively simple question. The Cuyahoga River Power Company is a public service corporation organized under the laws of Ohio for the purpose of erecting dams across the Cuyahoga River in Ohio to maintain a head of water and constructing locks and race-ways to carry such head of water to a power-house for generating hydro-electric power to supply individuals, corporations and municipalities with electric light and power. The corporation is formed under a statute of Ohio specifically authorizing corporations for such purposes to utilize the waters of any rivers or streams in the

State, making such corporations so formed common carriers, and giving them the power to enter upon private land for the purpose of making their surveys, etc., and the power to appropriate private property for the purposes of their systems.

In the charter which the appellant has from the State of Ohio, there is specifically set forth the waters of the Cuyahoga River to be used by it, and the exact termini of its improvement. After receiving its charter the appellant proceeded in good faith to enter upon the land of private owners for the purpose of making surveys, and did make surveys and had prepared for it at great expense detailed plans and specifications of its improvements showing with definiteness the precise property to be occupied. These plans, including specific descriptions of the several parcels of property required, were formally adopted by its board of directors. It then began appropriation proceedings against the owners of private property which it was necessary to take or use in carrying out its plans, and these appropriation proceedings are still pending. All these acts of the appellant were done before the acts of the appellee began.

The appellee, City of Akron, is a municipal corporation organized under the laws of Ohio, having the power to construct and operate a water-works system, and the power to condemn private property for this purpose, and including (for the purposes of this argument) the power to appropriate for water-works purposes property already devoted to a public use, *after paying compensation therefor.*

Subsequent to the acts above recited as done by the appellant, the City of Akron, acting under color of state laws, decided to construct a water-works system by which it proposes and is attempting to divert "all the waters of the Cuyahoga River" at or near the center of the location where appellant proposes to take the waters of said river, in such a way as will permanently interfere with and ultimately make valueless the property rights, franchises and privileges of appellant, thus completely preventing the carrying out of appellant's project, and utterly destroying all rights, franchises and property which appellant posseses. Although the city of Akron has appropriated and paid compensation for other property which it has taken and used in the construction of its dams and plant, it has not sought to appropriate any property of the appellant, nor pay any compensation therefor. The appellant seeks the protection of the federal courts to prevent the taking of its property without the payment of compensation.

Does such a case present a federal question within the jurisdiction of the federal courts?

In the brief for appellee it is contended that it does not for two reasons: first, because there is "no contract, property right, or interest in the appellant which is the subject of the contract and due process clauses of the federal Constitution;" and, second, because "even if the appellant has such rights those rights have not, under the Ohio law, been taken by the appellee."

I.

As to the first proposition, counsel for appellee state (Appellee's Brief, p. 15):

> "What the plaintiff appears to rely upon is not that mere incorporation and organization and the specification of its purposes gives it a standing before the court, but that by virtue of its adoption of plans it has thereby acquired a right to appropriate the property of others included in this plan; that this right has thereby acquired a priority over all others, except perhaps the State acting directly upon this property."

Add to this enumeration the further fact that appellant has also definitely located, by its plans, the precise property proposed to be taken, has given public notice of the property it so intended to take by beginning condemnation proceedings under the laws of Ohio, having summons served on the defendants and having them now in court—and the statement is fairly complete as to the acts upon which appellant relies.

Counsel for appellee further say: "Upon this point a large number of cases is cited (by appellant) and many quotations are made relating to priorities of railroad appropriators."

The principle, "relating to priorities of railroad appropriators" to which counsel refer, and upon which appellant relies, is substantially as follows:

A railroad company having, by proper proceedings, definitely fixed the termini of its road and the location of its line and right of way, is entitled to priority as against any other person or corporation subsequently attempting to acquire or utilize, as against the first company, the same location or any part thereof, or to render impracticable the use of the same location by the first company.

This proposition is now well settled by the decisions in this country, a large number of which are cited in the principal brief for appellant. It is but part of a larger principle applicable to all corporations having the power of eminent domain, and protecting them in their locations. (Lewis on Eminent Domain, Secs. 502-505.) Counsel for appellee concede the correctness of this well-settled principle but say that it is not applicable to the situation of the appellant in this case for a number of reasons. These reasons will be considered in their order.

(1) It is said (page 17 of appellee's brief).

> "While it may be that, as to rival railroad companies, priority in location of the right of way may in some cases give priority to construct a railroad upon that location, this is not the case under the laws of Ohio where the actual payment of compensation must precede the acquisition of rights in private property."

In other words, the contention is that the principle of the railroad cases does not apply in any state

the constitution or statutes of which require that where property is taken by condemnation, payment of the money shall precede the taking.

Our answer to this is:

(a) No such distinction is made in any of the cases and the principle has been applied in states where the payment for private property is required to precede the taking. Further, the exact opposite of the contention has been expressly sustained: *Sioux City, etc., Ry. Co. vs. Chicago, etc., Ry. Co.*, 27 Fed. Rep. 770 decided under the statutes of Iowa, which likewise required prepayment of the compensation. See also *Barre vs. Montpelier, etc., R. R. Co.*, 61 Vt. 1; 15 Am. St. Rep. 877; 4 L. R. A. 785.

(b) Again, in all the cases it is recognized that the railroad company acquires *no title as against the landowner* until compensation is paid, but it does acquire a right *as against third persons;* or, in the language of Judge Shiras in 27 Fed. Rep., 770:

> "The company does not perfect its right to the use of the land as against the owner thereof until it has paid the damages, but as against a railroad it may have a prior right and better equity."

(c) If it were necessary that the railroad company claiming priority should first have paid compensation to the landowner and thus become the owner of the property, then there would be no occasion for any of the cases on the subject, for the owner in fee of the property would have ample protection against its use by a rival railroad company without its consent.

(2) It is said in appellee's brief (page 17):

> "Nor is that doctrine (the one above referred to) applicable where such an assumed confliet exists between a private corporation organized for private profit and the sovereign State, or a political sub-division, in its enterprises to secure a public water supply for a municipality."

In other words, the contention is that the principle, though applying between rival railroad corporations, does not apply between a private corporation and a municipality seeking to use the location of the private corporation which has been definitely fixed.

Our answer to this is:

(a) No such distinction is made in any of the cases.

(b) On the other hand, the principle has been applied as well to municipal corporations as to rival railroad corporations and in two of the cases relied upon by the appellee it was distinctly recognized that the rule applies not only as against private corporations, but also as against municipalities. Thus, in *Adirondack Ry. Co. vs. New York*, 176 U. S., 335, it was specifically stated, with respect to the effect of the location of a railroad route under the New York statutes that:

> "as against all other railroad companies *and as against all other creatures of the State, empowered to use the right of eminent domain*, it gave the exclusive right to occupy the particular strip of land for railroad purposes * * *."

And in the case of *Ramapo Water Co. vs. New York*, 236 U. S., 579, the Court, although holding against the company upon other grounds, clearly indicated that the fact that the defendant there was a municipal corporation did not affect the plaintiff's position. On the contrary, municipal corporations were there placed in the same category and treated as being upon the same plane, in this respect, with private corporations; for after citing the *Adirondack case* as having settled the construction of the New York statutes to the effect that the filing of a map created no rights as against the State, the court said (236 U. S., 584):

> "We appreciate the argument that although the corporation may have had no lien on the land or right as against the sovereign power, it had a right *as against all subordinate bodies* to exclude them from the lands of its choice * * *."

This sentence, when read in connection with the rest of the opinion, amounts to a clear recognition of the principle for which we contend.

The appellant in that case was denied priority, however, solely because the charter rights under which it was acting had been repealed by the State and the rights growing out of the selection of a general location did not survive: (first) because the statute required not only the filing of a map, but likewise the filing of public notice to all occupants of lands intended to be acquired, and the appellant had not complied with these requirements, having filed a map only; and (second) because the map which it did file

was held by this court not to have been in compliance with the statute, being not a map of the route adopted and the land actually needed for that route, but of a "thousand square miles that the plaintiff claims."

(c) But what is the reason which counsel for appellee give for the alleged distinction in favor of municipalities? It is this:

> "As between a private corporation vested with the right of eminent domain for carrying on a business of a quasi-public nature and a subdivision of the sovereign State like a municipal corporation, which exercises the power of eminent domain to meet the most vital needs of its population for a supply of pure water for domestic purposes, there can be no question but that the latter is given a paramount right to appropriate property needed for that purpose although the same property has become the subject of earlier appropriation proceedings by a private corporation." (Brief for appellee, p. 16.)

Again:

> "The acts of the defendant performed under those statutes are in the exercise of the power of eminent domain delegated to it by the State. To this power all property is subject. (Appellee's brief, page 37.)

In the summary in appellee's brief, on page 54, it is said:

> "Such rights (of appellant) are subject to the paramount rights of eminent domain."

In other words, the proposition is that whereas a private corporation can not acquire any part of the location already selected by another corporation having the power of eminent domain because it can not interfere with the prior right or interest of the first corporation, a municipality can acquire the property and interfere with the right of such first corporation because of a "*paramount right to appropriate property needed for that purpose.*"

But the only paramount right ever given to a municipality that is withheld from a private corporation having the power of eminent domain is the power to condemn not only private property but the rights and interests in the same, although acquired by a private corporation for a public purpose under authority of the state; that is, the power to condemn property already devoted to a public use. But in such case the power is not a license to confiscate and destroy the rights without the payment of compensation, but the power to appropriate by eminent domain *after the payment of full compensation.* If the City of Akron has the power under the Ohio laws, of course it can take or appropriate the rights and interests, whatever they may be, of the appellant, but in such case it can do so only by the payment of compensation. Here it is seeking to take or destroy those rights and interests without paying compensation, and that is the act of which we complain. That is the gist of the whole case. For a municipality acting under the authority of state laws to take property, or rights and interests in property, for water-works purposes, without the payment of compensation therefor, is a denial of rights guar-

anteed by the Constitution, and protection against such action is afforded by the federal courts.

Not only in the sentences above quoted but throughout the brief, counsel for appellee constantly assert that the appellant's rights are held "subject to the paramount rights of eminent domain." As we have pointed out, this adds nothing to the argument, for if the rights of appellant are subject to the power of eminent domain this means that the municipality must pay for them if it takes them, and its attempt to take them without payment presents the clearest case for a federal court.

The above are the principal reasons counsel for appellee give for distinguishing the railroad cases from the case at bar; but other reasons are added.

(3) It is said that such corporations as the appellant are "free to carry out the plans of its officers, or not to carry them out, as they see fit." (Brief for appellee, page 11.) Of course (as the bringing of this suit shows), the appellant proposes to make secure and to utilize the property rights which it has acquired. The appellee, with full knowledge, has threatened and intended to take and occupy, and has crossed and recrossed appellant's location at many points, and this has made it impracticable for the appellant to proceed. But in the acquisition of its location according to law, the appellant has proceeded with due diligence and in good faith and has expended more than $100,000 before the beginning of this suit; and it desires to go on with the enterprise and

make use of what it has. The appellee has gone ahead since the suit was begun, but, of course, it could acquire no new rights by doing so. (*Denver & Rio Grande R. R. Co. v. Arizona & Colo. R. R. Co.*, 233 U. S., 601.)

But the suggestion of counsel for appellee has no application in any event. Fully stated, it is this:

A corporation having the power of eminent domain, although it has made a definite location in the manner discussed, is not entitled to protection in its contracts, property rights or interests in its location, which have been acquired by what it has done under the law, as against another corporation, coming in at a later date, seeking to take or destroy the same location, because the first corporation has not actually purchased the property included in its location and may at some time in the future decide not to go on with the enterprise.

The answer to this is that no such distinction has been made in any of the cases; and obviously no such distinction could be made, for in all the cases the courts were dealing with corporations in initial stages of their organization, seeking to prevent other corporations from seizing and using the property selected, to the injury or destruction of the rights of the corporations which had first definitely fixed their locations. In all the cases the corporations having fixed upon definite locations were held to have priority of right to the property included in such locations, notwithstanding the property selected had not actually been purchased, and notwithstanding that such corporations, as all corporations, *might* not go on

with the work because of forfeiture of charter or otherwise. In the sense that the appellant in the case at bar is free to carry out its plans or not to carry them out, the corporations plaintiff in the cases referred to were free to carry out their plans or not, and equally so were the corporations defendant.

To say that corporations in the initial stages of their enterprises when the necessary proceedings preliminary to the execution of the proposed work are being taken with due promptness, are without protection to the rights acquired by "location"—not on the ground of forfeiture of rights by non-user but on the ground that nothing has been acquired by what has been done, because there may in the future be a non-user or forfeiture—is to deny the reasoning upon which all the cases on the subject are based, and is equivalent to saying that all the cases were wrongly decided.

4. It is said that "a railroad location is of a definite right of way which may be indicated by plans and descriptions." (Appellee's brief, page 15.)

The contention here is that the decisions relating to priority of right of railroads are based upon the peculiar nature of a railroad location, being as counsel say, a definite right of way which may be indicated by plans and descriptions; and such cases therefore do not apply to locations made by other corporations.

(a) It is no doubt true that the cases are limited to those in which a corporation has made a definite location, and precisely fixed the termini of its improve-

ment, the line over which it is proposed to run, and the exact property actually needed for its purposes; but there is nothing in the principle upon which those cases are decided that would limit its application to contests between rival railroad companies, and logically it would extend to all cases of location by which the precise boundaries and termini, and property needed for the proposed improvement are designated —which is all a railroad company can possibly indicate. And, in fact, the principle has been so extended by the courts. In *Nicomen Boom Co. vs. North Shore Boom Co.*, 40 Wash, 315, the doctrine was extended to a contest between rival boom companies.

In that case the Court referred to the contention of appellant that boom companies, being quasi-public corporations, having the power of eminent domain and appropriating property according to the method adopted for railroad companies, were analogous to railroad companies, and the same principles as to location should apply, and said:

> "We think the analogy suggested by appellant is forceful and that the railroad cases cited are useful in determining the principles applicable here."

(b) But further, the location by the appellant is of a "definite right of way which may be indicated by plans and descriptions," and, as the appellee must concede, *it has been so indicated.*

(c) In addition, for the purposes of the question here involved, the analogy between a railroad company in Ohio and the appellant, is complete. Both

are organized under general laws, both fix in their charters the precise termini of the improvement, both have the right to enter upon private land for the purpose of surveying and fixing the line of their improvement prior to any appropriation, both have the power to appropriate such property as may be necessary for their improvements, both appropriate that property under the same statutes relating to condemnation of private property, and companies formed under the statute under which appellant is formed are expressly made common carriers "subject to all the liabilities and duties of such companies under the laws of the State," just as are railroad companies.

(5) It seems to be contended that the doctrine of priority of railroad locations does not apply to the situation of the appellant in this case because the appellant has not filed with the state any map of its location. At page 15 of appellee's brief, it is said, in reference to the filing of maps of railroad locations:

> "Until such filing or other publications, at least, the location is wholly an internal one on the part of the corporation subject to its own control. * * * It seems that as to those outside the corporation such an internal act confers on the corporation no actual rights."

(a) But an examination of the cases on the subject will show that no such distinction is made. Where a statute requires that a map shall be filed before the corporation is in a position to acquire any right or interests in property selected by it, then the filing of

such map is a prerequisite to acquisition as against other corporations or any rights to the chosen location. But the doctrine referred to has been recognized as equally applicable in those States where no filing of a map of location is required by statute, and priority in the right of way is given in such States, if the location is shown to have been definitely adopted, though not filed. *Williamsport & North Branch Ry. Co. vs. Phila. & Erie Ry. Co.,* 141 Pa., 407. In *Chesapeake & Ohio Ry. Co. vs. Deepwater Ry. Co.,* 57 W. Va., 641, it is said:

> "When the statute does not make the filing of a map or plat of a railroad location a prerequisite to the adoption of it, an appropriation of it may be made without the filing of such map."

(b) That no such distinction is proper is recognized in *Denver & Rio Grande Ry. Co. vs. Arizona & Colorado R. R. Co.,* 233 U. S., 601, where priority of right of a railroad corporation to its location was sustained, although it had not filed any map of its location at the time of the interference with the right by a rival railroad company and at the time proceedings for protection of its location were taken.

In the case at bar the precise termini and line of improvement of the appellant were set forth in its charter, private property was entered upon under authority of the statute, surveys made to locate the line, and maps and plans showing the precise limits of the location and the property needed were formally adopted by the company and land owners were

notified of the property to be taken by proceedings in court.

This is exactly the method adopted in Ohio by railroad companies in definitely fixing locations and neither railroad companies nor hydro-electric companies using the streams in the State, are required to file maps with the public authorities.

(6) It is contended that the appellant has no rights in a court of equity as against the appellee because appellant has not yet paid for the property of land owners which it is seeking to take for its location. At page 20 of appellee's brief it is said:

> "If the right which the plaintiff claims is 'property' of which the plaintiff can not be deprived under the United States Constitution, it is equally 'property' of which the true owners can not be deprived under the Ohio constitution, without compensation being first made in money."

Indeed, this argument is carried to the extent of saying that because appellant had not, at the time of the institution of this suit, paid compensation to the land owners whose property was under condemnation, appellant "does not come into equity with clean hands."

(a) This contention is so well answered in the cases relating to priority of rights to railroad locations that it is not necessary to notice it at length here. In all the cases the question before the court was the right of a corporation which had adopted its location and decided upon the property to be acquired, but

had not actually acquired such property by the payment of compensation, to be protected as against other corporations seeking to use the same property or destroy the contemplated use of such property by the plaintiff. In *Sioux City, etc., Ry. Co. vs. C., M. & St. P. Ry. Co.*, already referred to, it was contended that the defendant had no rights or property in its selected location as against the plaintiff because—

> "the defendant had not paid the damages to the owners of the land, that payment is necessary under the statutes of Iowa to create a right in the railway company as against the owner of the land, that until payment is made the owner's control over his property is absolute, and he can convey the same or a right of way over the same to any railway company."

This contention was disposed of in that case, as it was likewise in the case of *Williansport & North Branch Railroad Co. vs. Phila. & Erie R. R. Co.*, 141 Pa., 407:

> "The title of the owner is not divested until the last of these steps has been taken, (that is, payment of compensation).
>
> "As against him the corporation can acquire only a conditional title by its act of location, which ripens into an absolute one upon making compensation. *As to third persons and rival corporations, however, the action of the company adopting a definite location is enough to give title.* For this reason in several of the United States provision is made by law for recording the action of the company and the line adopted by it.

> so as to give notice to the public, and to settle questions of priority of title. We have no such statute and the action of the company must be proved by other competent evidence. Heise vs. Pennsylvania R. Co., 62 Pa., 72. But when proved it has the same effect upon all interested as though it had been recorded. It settles the date of actual appropriation, and shows the exact location of the line of the road proposed."

(7) It is contended that the appellant has no right in its location because its charter is subject to amendment, alteration or repeal by the legislature of Ohio. At page 38 of appellee's brief, it is said:

> "under the provision of the Ohio constitution * * * any contract which the plaintiff may have is subject to alteration and repeal by subsequent legislation or action by the State."

In somewhat different language this same contention is repeated in the summary, page 54 of appellee's brief.

(a) It is sufficient to say in answer to this that the appellant's charter and rights *have not been repealed* but are still in full force and effect. At page 12 of the appellee's brief it is conceded that appellant "has a right to proceed."

Of course, the reserved right of the State to alter or repeal charters does not affect the rights of the corporation so long as the charters are not repealed. Such reserved right of the State no doubt existed in the case of all the railroad companies which were held entitled to priority of right in locations. The suggestion that the right to repeal charters has been

delegated to the city of Akron and has been exercised by the destruction of the rights of the appellant by that city, need not be noticed. Municipal corporations have not the power to alter or repeal charters granted by the State.

We have sought to show that the criticisms made by counsel for appellee of the application to this case of the doctrines in the railroad location cases are unsound. The cases cited in the principal brief for appellant make clear the right resulting from locations by corporations having the power of eminent domain, and show that this right is property which will be protected by the courts. If such property right is sought to be taken by a municipality under the power of eminent domain without the payment of just compensation, there is a violation of the Constitution, and the federal courts have jurisdiction to grant relief. *Chicago, B. & Q. R. R. Co. v. Chicago*, 166 U. S., 226.

II.

Passing to the second reason given by counsel for appellee why the Federal Court has no jurisdiction, to-wit: that "even if the appellee has such rights (as those claimed) those rights have not under the Ohio law been taken by the appellee," counsel for appellee devotes a number of pages of their brief (28 to 46) to the contention that whatever property rights may have been acquired by the appellant, they are subject to the power of eminent domain. The entire provisions of Ohio laws by which municipal corporations

may exercise the power of eminent domain are set forth. At page 37 it is said:

> "the acts of the defendant (city of Akron) performed under those statutes are in the exercise of the power of eminent domain delegated to it by the State. To this power all property is subject."

At page 41 it is said that "long before the incorporation of the plaintiff powers of eminent domain had been conferred upon the defendant."

The only purpose of this long discussion by counsel for appellee is to demonstrate that the city of Akron could, if it desired, take the property rights of the appellant by condemnation proceedings. But suppose this were true. If taken by condemnation proceedings compensation would have to be made to the appellant, and it is not contended that any compensation has been paid or is intended to be paid. Assuming that the city of Akron has the power to take by eminent domain, the very thing complained of in this case is that the appellee is taking property without paying compensation in violation of the Constitution of the United States. In order to be applicable to this case, the syllogism of counsel for appellee would have to be this: the property rights of the appellant can be taken by the city of Akron under its power of eminent domain, and by the payment of compensation: therefore the property rights of the appellant can be taken in any other way and without the payment of compensation.

But counsel for appellee realize that such argument is futile so the contention is turned around and it is said:

> "Assuming that the plaintiff has alleged ownership of any property which is the subject of appropriation, for the plaintiff to contend that that property has been taken without compensation is merely an allegation that the defendant has acted unlawfully and without authorization under the laws and constitution of Ohio." (Brief for appellee, p. 46.)

In other words, the argument is now put, in effect, this way: Since the city of Akron can not take without paying compensation and since the City of Akron has not paid any compensation, therefore, there could not have been any taking by the city of Akron. But such an argument is equally futile. The fact remains that the property rights of the appellant are being taken by the city of Akron, and that is the complaint in this case, and they are being taken and utterly destroyed by the city of Akron as a municipality acting under color of authority conferred upon it by state laws providing for the building and acquisition of water-works systems by municipalities, and the Federal Courts have jurisdiction in such case, to afford relief. *Home Telegraph Co. vs. Los Angeles,* 227 U. S., 278.

We have sought to analyze and meet the contentions of counsel for appellee in answer to the principles and long line of authorities in support thereof

set forth in the principal brief for appellant. We respectfully submit that the contentions of the appellee and the authorities in support thereof leave undisturbed the correctness of the principles for which appellant contends and their applicability to the case at bar.

Respectfully submitted,

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Of Counsel.

ADDENDA.

The appellee having cited two of the "Ohio Bank Cases" without reference to the cases of the same series in which this Court *reversed* the rulings of the Ohio Supreme Court, we give the citations of those cases here:

Piqua Branch Bank v. Knoop, 16 How., 369;
Mechanics & Traders Bank v. Debolt, 18 How., 380;
Mechanics & Traders Bank v. Thomas, 18 How., 384;
Jefferson Branch Bank v. Skelly, 2 Black., 436;
Franklin Branch Bank v. State of Ohio, 2 Black., 474.

A note discussing these cases will be found in 60 L. R. A., 60.

9

SUPREME COURT OF THE UNITED STATES.

October Term, 1914, No. 965. 465

THE CUYAHOGA RIVER POWER COMPANY,
Appellant,

against

THE CITY OF AKRON,
Appellee.

Appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division.

BRIEF FOR APPELLANT

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APPEAL PRINTING COMPANY, New York.

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Supreme Court of the United States.

OCTOBER TERM, 1914.

THE CUYAHOGA RIVER POWER COMPANY,
Appellant,
against
THE CITY OF AKRON,
Appellee.
No. 985.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

BRIEF FOR APPELLANT.

Statement of the Case.

Under color of authority of State laws—under an assertion of power from the State, the appellee, an Ohio city having a population of less than 90,000 persons, is attempting to take and divert for water supply purposes *"all the waters of the Cuyahoga River* at and above a line heretofore fixed as the axis of a proposed dam to be built by said city in the Township of Franklin, County of Portage and State aforesaid," amounting on the average to 200,000,000 gallons daily, or nearly ten times the amount the city can use for those pur-

poses for at least thirty-five years to come. Such a taking and diversion would utterly destroy the property and franchises of the appellant (a public utility corporation of Ohio), but the appellee is nevertheless proceeding to accomplish this result without paying one cent of damages or compensation for the property and franchises of which the appellant is being thus deprived.

This suit for an injunction was accordingly brought by the appellant in a District Court of the United States upon the ground that the proceedings on the part of the defendant (appellee) amount to a taking of the plaintiff's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. It is alleged, also, that the State laws under color of which the defendant is acting have been impliedly repealed by subsequent State legislation and do not authorize the defendant's acts, but that if they do constitute authority for the defendant's proceedings, then they impair the obligation of the plaintiff's contract with the State of Ohio which resulted from the plaintiff's acceptance of the State's grant of certain franchises set forth in the bill, and that such laws are, therefore, obnoxious to Section 10 of Article 1 of the United States Constitution prohibiting the passage of any law impairing the obligation of contracts.

The District Court ruled that the controversy thus presented does not arise under the Constitution of the United States, and for that reason dismissed the suit *for want of jurisdiction.* Upon this jurisdictional question we come directly here under Section 238 of the Judicial Code.

The case was originally heard by District Judge

DAY, who, in granting a motion to dismiss the bill, delivered a written opinion which is reported in 210 Federal, 524. He granted leave, however, to file an amended bill and this was accordingly done (Record, p. 36).

Upon the filing of the amended bill, the defendant again moved to dismiss for want of jurisdiction (Rec., p. 28-30, and this motion was granted by District Judge KILLITS. Judge KILLITS did not write any opinion, but stated that he followed the decision by Judge DAY. The certificate of the jurisdictional question appears at page 61 of the record.

The main difference between the original bill and the amended bill is that the latter sets up that after the passage of the ordinance under which the city authorities are acting the people of the State of Ohio adopted an amendment to the State Constitution relative to the acquisition of water-works and other public utilities by municipal corporations which impliedly repeals the statutes under authority of which the ordinance was passed, and that the defendant city is thus without any legal authority whatever to proceed with its undertaking. So far as concerns the points discussed in Judge DAY'S opinion, the two bills are substantially the same.

Decision Below. Specification of Errors. Questions Presented.

As already indicated, the theory of this suit is that the plaintiff has property—a franchise acquired by grant from the State and thus constituting also a contract—and that that property is being taken, interfered with and destroyed by the

acts and proceedings of the defendant done and carried on under color of authority of State laws and under an assertion of power from the State, but, in fact, without any legal authority whatever, or, if the authority still exist, then that the taking is yet in violation of the contract and due process clauses of the Constitution because no compensation has been or is to be paid to the plaintiff for the property so taken.

The particular questions involved and the specific errors relied on are sufficiently set forth in the points of the argument which follow and in the assignment of errors at pages 63-66 of the record. It is desirable at this place, however, to call attention to the opinion below in order to emphasize the mistaken theory upon which the decision rests.

The opinion below refers to the allegations of the bill with respect to the plaintiff's rights and franchises, sets forth the statutes of Ohio authorizing municipal corporations to appropriate property for water supply purposes, and then says:

> "The main question presented is whether a law which in terms gives to a municipal corporation, after paying compensation, the right to appropriate that which has already been appropriated, or which a private corporation intends to appropriate, deprives the private corporation of any right in which the Constitution of the United States protects it."

After thus *misstating*, as we contend, the real question in the case, the Court proceeded to point out that as the laws of Ohio forbid the defendant from taking the plaintiff's property *without first paying compensation therefor*, there was an adequate remedy in the State Courts for any violation of

those laws, and hence no infraction by the State of any rights secured to the plaintiff by the Federal Constitution was shown. In other words, the learned Court below complacently assured the plaintiff that its rights under the Federal Constitution could not be infringed, because the statute of Ohio "plainly requires that compensation be made the plaintiff before the City can acquire the right to divert," that "before the City may take this right it must compensate the plaintiff," and that if the City does not or cannot pay for the plaintiff's property "then, under the law of Ohio, the property of the plaintiff can never be taken by the City of Akron, and the plaintiff cannot in any way be interfered with by the defendant." Upon this ground the Court refused to take jurisdiction and denied relief.

But notwithstanding these assurances—these judicial iterations of safeguards and prohibitions plainly stated in the Constitution and laws of Ohio as well as in the Constitution of the United States—*the fact remains that the City of Akron is proceeding under color of authority of State laws to take the rights and property of the plaintiff without paying compensation therefor.*

Thus, in a Federal Court, the existence of a State prohibition against the taking of property without compensation is made the basis for refusing to enforce the similar prohibition contained in the Federal Constitution. This, we submit, is erroneous.

ARGUMENT.

POINT I.

The claim that the action of the appellee in diverting the waters of the Cuyahoga River is the action of the State, and, if carried out, would violate the provisions of the Fourteenth Amendment to the Constitution of the United States by taking the property of the appellant without due process of law, constitutes a Federal question.

Whatever confusion may once have existed with respect to Federal jurisdiction in cases of this kind, or may still exist among some of the lower Courts, two propositions have been so thoroughly settled by recent decisions of this Court as to leave no doubt upon this point.

1. The payment of just compensation for property taken under an exercise of the power of eminent domain is an essential element of due process of law, and no taking is lawful unless such compensation be actually paid. Thus, although the statute may expressly provide for the payment of compensation, yet if the compensation be not paid and the necessary result of the *action taken under the statute* be to deprive a person of his property without compensation, then the taking is not by due process of law.

Consolidated Turnpike Co. v. *Norfolk, etc., Ry. Co.*, 228 U. S., 326, 330.
Chicago, B. & Q. R. R. Co. v. *Chicago,* 166 U. S., 226.
Appelby v. *Buffalo,* 221 U. S., 524.

This proposition is further sustained by the cases holding that a statute fair and legal on its face may be so administered as to amount to a deprivation of constitutional rights, and that if State statutes "upon their face, *or in the manner of their administration,* have the effect to deny rights secured by the Federal Constitution * * * they must fail."

United States v. *Reynolds,* 235 U. S., 133, 149.

McCabe v. *Atchison, T. & S. F. Ry. Co.,* 235 U. S., 151, 160.

Yick Wo v. *Hopkins,* 118 U. S., 356, 373.

2. Whoever by virtue of public position under a State Government (including a municipal corporation and its officers) deprives another of property without due process of law, violates the Constitution; and where an act is being done under an assertion of power from the State which could only be done upon the predicate that there was such power and which if done would result in violating a right secured by the Federal Constitution (*e. g.,* taking property without due process of law), there is an immediate right to appeal to the Federal judicial power, *i. e.,* a right to sue in the Federal Courts, to prevent or redress the wrong by dealing with the officer or agency committing the act and the *result* of his or its exertion of power, although the consummation of the wrong may not be within the powers possessed and may be actually forbidden by State safeguards and prohibitions identical in form with the safeguards and prohibitions of the Federal Constitution. Indeed, under such circumstances, "inquiry concerning whether the State has authorized the wrong is irrelevant."

Home Telephone & Telegraph Co. v. *Los Angeles*, 227 U. S., 278, 287, 288, 290, 292, 294, 296.
Raymond v. *Chicago Traction Co.*, 207 U. S., 20, 35.
Ex parte Young, 209 U. S., 123, 155.
Portland Ry. L. & P. Co. v. *Portland*, 210 Fed., 667, 669.

From these propositions it inevitably follows that the Court below erred in saying that the bill presents no Federal question. Indeed, a reading of its opinion makes it manifest that the learned Court fell into the identical error which was committed by the District Court in California, in the *Los Angeles Telephone case, supra*, and which was corrected by this Court in an elaborate opinion obviously designed to clear up for all time the uncertainty which seemed to exist upon the subject there discussed.

Just as in that case the fact that the California Constitution forbade the taking of property without due process of law did not defeat Federal jurisdiction, and just as in *Raymond* v. *Traction Company, supra*, the fact that the action complained of was wrongful from the point of view of the Illinois Constitution and statute did not show the nonexistence of a Federal question, so here, in the case at bar, the fact that the laws of Ohio do not actually authorize the defendant's proceeding and expressly forbid the taking of property without compensation does not defeat the right of this plaintiff to sue in the Federal Court.

POINT II.

The bill having presented a Federal question, the District Court was under a duty to take jurisdiction of the case and decide all questions in the case, regardless of which way those questions should ultimately be determined.

Another proposition thoroughly settled by decisions of this Court is this: Where a bill alleges a contract and its impairment by State laws or the possession of a property right and its deprivation by State officers (*i. e.*, persons acting under an assertion of power from the State), without due process of law, or, in other words, where a bill presents a Federal question, the case "arises under the Constitution of the United States," and the Federal Courts *must* take jurisdiction and decide *all* the questions arising therein whether the questions are such that the plaintiff will ultimately prevail or not.

Siler v. *Louisville & Nashville R. R. Co.*, 213 U. S., 175, 191.

Willcox v. *Consolidated Gas Co.*, 212 U. S., 19, 39, 40.

Mercantile Trust Co. v. *City of Columbus*, 203 U. S., 311, 319, 322.

Knoxville Water Co. v. *Knoxville*, 200 U. S., 22, 32.

Vicksburg Water Works Co. v. *Vicksburg*, 185 U. S., 65, 82.

The Fair v. *Kohler Die Co.*, 228 U. S., 22.

It follows, therefore, that regardless of what may be anticipated with regard to the actual

merits of the plaintiff's allegations—whether true in point of fact or correct in point of law—the decree here must be reversed. We desire, however, to go further in this brief and demonstrate that the plaintiff actually has property rights of which it is actually being unconstitutionally deprived, or, in other words, that assuming, as the Court must, that the facts alleged are true, the plaintiff's case is meritorious.

POINT III.

The plaintiff has acquired by grant from the State of Ohio, and now owns, holds and possesses, a prior and exclusive right or franchise to appropriate and use, and it has in fact duly appropriated, the waters of the Cuyahoga River, and the lands to which the same are appurtenant, to the extent necessary and convenient for the execution of its corporate purpose of developing and furnishing hydro-electric power for a public use.

The Court below thought the plaintiff did not have any "property" because the bill did not show that it had acquired from the private owners the actual title to the soil upon which its proposed improvements were to be erected—thereby ignoring the existence of intangible property such as contracts and franchises which are acquired not from the private owner of the soil, but directly from the State itself. Here again we submit the Court erred.

The statutes of Ohio have for a long time provided:

"Except for carrying on professional business a corporation may be formed for any purpose for which natural persons lawfully may associate themselves."

Ohio General Code, Section 8623.

In 1904 the State Legislature enacted a statute (Ohio Laws, Vol. 97, p. 300), formerly designated as Sections 3878 *et seq.* of the Revised Statutes and now contained in Sections 10,128 to 10,134 of the Ohio General Code of 1910, the material parts of which are as follows:

"Section 10128. Any company or companies organized for the purpose of erecting or building dams across rivers or streams in this State to raise and maintain a head of water, or for constructing and maintaining canals, locks, and race-ways to regulate and carry such head of water to any plant or power house where electricity is to be generated, or for erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity, or for transporting natural gas, petroleum, water or electricity, through tubing, pipes or conduits, or by means of wires, cables or conduits, or for storing, transporting or transmitting water, natural gas or petroleum, or for generating and transmitting electricity, *may enter upon any private land* for the purpose of examining or surveying a line or lines for its tubing, pipes, conduits, poles and wires, or for a reservoir, dams, canals, race-ways, plant or power house, and for ascertaining the number of acres overflowed by reason of the construction of such dam or dams, and *may appropriate* so much thereof as is deemed necessary for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoir, plant and power house, as well as the land overflowed, and for the erection of tanks and reservoirs

for the storage of water for transportation and the erection of stations along such line or lines, and the erection of such building as may be necessary for the purpose aforesaid.

"Section 10129. Such appropriation shall be made in accordance with the law providing for compensation to the owners of private property appropriated to the use of corporations."

"Section 10132. Such company or companies, for the purpose of transporting natural gas, oils, water, and electricity shall be a common carrier, and subject to all the duties and liabilities of such carriers under the laws of this State."

In other words, the organization of private companies to utilize the rivers of the State for the development of hydro-electric power was expressly recognized, approved, and provided for, and such companies were made common carriers and vested with the power of eminent domain.

This statute was declared constitutional and valid, and the right of corporations formed for those purposes to appropriate private property for hydro-electric developments, was sustained by the Supreme Court of Ohio in 1908 in a case in which the purposes of the corporation were substantially identical with the purposes of the plaintiff here, except that the corporation there was organized to develop the Little Miami River, while the plaintiff was organized to develop the Big Cuyahoga River.

> *White* v. *Little Miami Light, Heat & Power Co.*, 77 Ohio St., 633, affirming, upon the authority of *Giesy* v. *C. W. & Z. R. R. Co.*, 4 Ohio St., 326, a judgment of the Circuit Court of Clermont County, which affirmed upon the opinion of the

Probate Court, a judgment of the Court of Common Pleas of that County affirming a judgment of the Probate Court of that County. See Opinion of Probate Court in 5 Ohio Nisi Prius Rep. (N. S.), 204, printed also as Appendix I of this brief.

It may be noted, too, that other States and other Courts, also, have recognized the development of hydro-electric power from natural waterways as an important public use, amply justifying an exercise of the power of eminent domain by private companies (*Walker* v. *Shasta Power Co.*, 160 Fed., 856; *Hagerla* v. *Mississippi River Power Co.*, 202 Fed., 776), and that the United States Government has given its approval and aid to a similar development by a private company in the Mississippi River (*Hagerla* v. *Mississippi River Power Co., supra;* and Act of Congress of Feb. 9, 1905, 33 Stat. L. C., 566).

The obvious purpose of the statute quoted above was to provide for the conservation, development and use of the natural resources of the State—"not theoretical conservation of natural resources of which we hear so much, but (is) conservation of the practical kind that ought to appeal to every thinking man"—and it cannot be doubted that the intention of the Legislature in enacting it was to encourage the investment of private capital in the public enterprise of utilizing the rivers of the State for furnishing its citizens with light, heat and power by granting the privilege of performing this public service to whomsoever would undertake the work. It is thus apparent, and the authorities hereinafter cited conclusively show, that this stat-

ute is in legal effect an open, general offer by the State to all persons of the right to appropriate the rivers of the State for this public purpose and an invitation to all to avail themselves of this privilege.

In 1908 the plaintiff was organized under the laws of Ohio for the purposes mentioned in that statute. It thereby *accepted the State's offer* and that it was thereby granted the rights, powers and privileges specified in the statute is too plain for argument. The articles of incorporation state*:

> "Said corporation is formed for the purpose of acquiring, taking, building, maintaining and operating dams *in the Big Cuyahoga River in the State of Ohio,* to raise and maintain a head of water; of constructing and maintaining canals, locks and raceways to regulate and carry said head of water to any plant or power house where electricity is to be generated; of erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity; of acquiring, producing, manufacturing, generating and selling electricity for light, heat, power and other purposes;" &c.

They further state:

> "Said company's improvements are to begin at the confluence of the Big Cuyahoga River and the Little Cuyahoga River below the City of Akron, Summit County, Ohio, and extends along said Big Cuyahoga River through the County of Summit to a point where said Big

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*The original Articles of Incorporation were filed with the Secretary of State of Ohio on May 28, 1908, and were amended in January, 1912. In the interest of brevity the terms of the original articles were not given in the bill, but as the articles constitute a public record, it seems not inappropriate to quote them here.

Cuyahoga River crosses the line between summit and Portage Counties."

There can thus be no doubt that by the express language of the statute the plaintiff was granted *the right to appropriate the waters of the Cuyahoga River for the purposes stated in its articles of incorporation.* This statute is still in full force and effect; and it being so explicit in granting the right to appropriate, and the articles of incorporation being so explicit in locating the plaintiff's development as along the course of a named river between two specified points or terminii, it would be difficult indeed to find any legal principle upon which it could be said that the contract between the State and the plaintiff, by which the plaintiff was granted the right it now claims to have, was not complete and perfect the moment the plaintiff was duly organized. In this case, however, the plaintiff is not compelled to rely upon this interpretation, for it has gone much further.

After its incorporation and pursuant to and in exercise of its corporate powers, the plaintiff, on June 3, 1908, adopted a development plan made by its engineers, and by proper corporate action, it resolved to "proceed forthwith to construct and build the improvement set forth" in the plan so adopted. This plan provided for the construction of a dam in the Cuyahoga River at or near Portage Street in the Village of Cuyahoga Falls, the height of which was fixed at 70 feet. By means of this dam the plaintiff would obtain a water-fall of 236 feet, and the plan provided also for the construction of a canal or conduit and a power house suitable to convert into electric energy the water power obtained from that fall (Original Bill, Par. V; Amended Bill, Pars. VI and VII).

The plan so adopted was exceedingly definite and precise, and by means of courses and distances it definitely *located* the *precise lands* which the plaintiff appropriated and proposed to acquire in the execution of the plan (see descriptions in Original Bill, Par V).

The adoption of this plan and the location of the property necessary to be acquired in order to carry it out were, of course, preceded by examinations and surveys and the making of maps, plans, and profiles describing the proposed improvement—all which involved great cost and expense; and the moneys so expended obviously constitute an investment of money and a change of position by the plaintiff upon the faith of the State's express statutory grant of the right to appropriate this property and utilize it in carrying out its corporate purposes.

On April 23, 1909, after further examination and surveys of the watershed of the Cuyahoga River had been made and further maps, plans and profiles and other details of the improvements had been prepared at great cost and expense, the plaintiff, by appropriate corporate resolution, adopted a supplemental plan, the details of which are described in the bill (Original Bill, Par. VII; Amended Bill, Par. IX). Briefly stated, this plan was to erect a reservoir or dam, called Hiram Dam, south of Burton Station in Geauga County in order to provide storage for equalizing the flow of the river; connect the river with Silver Lake about two miles above the dam at Cuyahoga Falls (Gaylord Dam) and utilize Silver Lake, Little Lakes, the Mud Brook channel, and the Brandywine Basin as additional storage reservoirs; return the waters therefrom to the Cuyahoga River at the

Village of Vaughn, where another powerhouse was to be bui and erect transmission lines to the market. A reading of the description of the plan in the bill and an examination of the map attached thereto as Exhibit C will show the great particularity of the plan and exhibit the comprehensive design formulated by the plaintiff for its development and utilization of the waters of this river.

Immediately after adopting its first plan on June 3, 1908, the plaintiff *instituted condemnation proceedings* against the owners of the lands affected (Original Bill, Par. XI ; Amended Bill, Par. XIII) and thereby exercised the power of eminent domain given it by the statute. Under the Ohio statute such proceedings must be preceded by an effort to agree with the owner as to the compensation to be paid (Ohio General Code, Section 11039) and must be based upon a petition containing a "specific description of each parcel of property, interest, or right" to be acquired (*Idem*, Sec. 11042); and the proceedings instituted by the plaintiff were bitterly contested upon these points. The Supreme Court of the State sustained the descriptions as being sufficiently specific (*Northern Realty Co.* v. *Cuyahoga River Power Co.*, 88 Ohio St., 616) but decided in January, 1912, that the offers to purchase were invalid, because the owners were not given a sufficient time to consider them. (*Big Cuyahoga L., H. & P. Co.* v *Turner, Vaughn & Taylor Co. et al.*, 85 Ohio St., 482).

In the meantime, *i. e.*, from April, 1909, to the rendition of the decision mentioned above, the plaintiff, in addition to prosecuting these condemnation proceedings through to the highest State Court, was engaged in making the necessary de-

tailed surveys of the lands necessary to be acquired for the carrying out of its supplemental plan mentioned above.

On February 2, 1912, the "purpose clause" of the plaintiff's articles of incorporation was duly amended so as to state that the purposes included the erection of dams in Tuscarawas River, Mud Brook, Brandywine and Tinkers Creek, and the tributaries of each of them, as well as in the Cuyahoga River, to raise a head of water and to generate and supply electricity, etc. (Amended Bill, Par. IV). The amended articles further set forth that the improvements which the plaintiff is to construct:

> "will be for the purpose of transmitting and conducting electricity, and will have its eastern terminus at or near the Village of Burton Station in Geauga County; its western terminus at or near the confluence of Tinkers Creek and the Cuyahoga River in Cuyahoga County, and its southern terminus at or near Canal Dover in Tuscarawas County, and with its main line and branches will pass in or through the Counties of Cuyahoga, Summit, Medina, Portage, Stark, Geauga and Tuscarawas in said State."

The purpose of these amendments was to embrace the improvements to be made under the supplemental plan (see Map, Exhibit C, attached to the Bill). They somewhat enlarged the corporate purposes by taking in a larger territory along the Cuyahoga and its adjacent watershed, but did not *change* the corporate purposes; and they were fully authorized by the laws of Ohio (General Code, Section 8719). After the amendments were made the supplemental plan was ratifid, as were also the surveys and locations made

thereunder; and on April 8, 1912, as the bill expressly avers (Amended Bill, Paragraph X):

> "complete surveys, maps and descriptions of all lands necessary to be acquired by it for the construction of its reservoirs and dams and for the riparian rights and easements along the Cuyahoga River through the Counties of Geauga, Portage and Summit to the Gaylord Bridge at Cuyahoga Falls were before plaintiff's Board of Directors, and said surveys and maps had been or were then definitely adopted by the plaintiff; and the plaintiff's proposed improvement was definitely outlined, fixed and determined."

It was, of course, impossible, and in fact improper, to set forth all these descriptions and plans in the bill, but the fact is (and this Court must so assume upon this appeal in advance of the final hearing upon the proofs) that these surveys, maps, and descriptions which the bill avers were adopted, covered all that portion of the lands which the plaintiff proposed to take which are affected by the proceedings of the defendant.

Since the date aforesaid, the plaintiff has commenced additional condemnation proceedings (Amended Bill, Par. XIII), and at all times since its organization the plaintiff has been and is now in good faith, actively and diligently engaged in taking the steps necessary to consummate the purposes for which it was organized (*Id.*, Par. XV). Indeed, there never was a company which worked in such good faith or pressed forward its undertaking so persistently; and of all the cases that have been brought before the Courts by companies seeking to protect their franchises from invasion during the period which necessarily precedes physical construction, there is not one in

which the equitable standing of the company was as good as that of this plaintiff, which comes here without a suspicion of laches or bad faith of any sort.

From the allegations of the bill some of which we have briefly summarized above, it is apparent that before the defendant or any other person, corporation, or body politic had made any location, survey, or appropriation of the waters of the Cuyahoga River or even declared an intention to utilize those waters for any public purpose, the plaintiff had surveyed and *definitely fixed and located the lands which it would use and had started to acquire and was in process of acquiring absolute title thereto from the private owners thereof.* There was nothing more it could do to protect its rights.

By reason of these facts the plaintiff claims that it had become vested with a prior and exclusive right to acquire and use for its corporate purposes the lands and waters located and described in its adopted plans and surveys, just as effectively as if the grant of that right had been contained in a special act specifically describing those particular lands and waters and directly vesting in the plaintiff by name the right to appropriate and use the lands and waters so described. In other words, the plaintiff claims that it had acquired, by grant from the State, *a franchise* to construct and maintain in and upon those particular lands and waters, the dams, reservoirs, canals, conduits, powerhouses, transmission lines, and other appurtenances requisite to a plant for the development of hydro-electric power from the waters of the Cuyahoga River, and to use the waters of that river in the operation of the

same; which franchise included, as an essential element thereof, the right to continue the condemnation proceedings and acquire the titles of the individual owners free from the interference of any third person or corporation.

This claim is based upon the principle of contract—not figuratively or as a legal formula, but actually and practically, upon the proposition that by the statutes we have quoted above the State of Ohio really said to the men who organized the plaintiff that if they would agree to convert the wasting waters of a river into hydro-electric energy for the use of the people, the State would agree that they might, by an exercise of its sovereign power of eminent domain, appropriate and use the waters of that river and its appurtenant lands in order to carry out their agreement. The men to whom that statement was made took the State at its word: they made the agreement which was invited and invested and spent money in proceeding to perform. All they ask now is that the State be held to its part of the bargain. It is idle and fallacious to say that the plaintiff may or may not go ahead and construct its plant —that it is under no obligation to proceed. The plaintiff is under the same obligation to construct its plant and furnish electricity for a public use which rests upon every party to every contract, *i. e.*, an obligation to perform according to its terms; and it is subject to the same penalties for failure to perform. Every element of contract is present—the common, ordinary, every-day rules of bargain upon which men really act in all their undertakings and all their relations with their fellows, whether as individuals or as constituting the sovereign State; and our contention, we sub-

mit, is precisely sustained by a decision of the Supreme Court of Ohio, which, though involving somewhat different facts, is indistinguishable in principle and fit for confident application here.

That case is *Hamilton G. & C. Traction Co.* v. *Hamilton & L. Electric Transit Co.*, 69 Ohio St., 402, 69 N. E., 991. In that case the Transit Company had been granted by the City of Hamilton, under authority from the State, the right to construct, operate and maintain an electric street railroad upon certain streets designated in the ordinance. Thereafter, the City passed an ordinance granting the Traction Company the right to construct, maintain and operate a street railroad in, upon and along the same streets, the ordinance providing that the track of the Traction Company should be laid in such manner that one rail would be between the rails of the track of the Transit Company. The Transit Company thereupon sued to enjoin the Traction Company from constructing its road in that manner, upon the ground that the plaintiff's franchises would be thereby violated and invaded. The Court entered a decree perpetually enjoining the Traction Company from occupying the street or constructing a road therein "unless the defendant acquires the right by appropriation." This decree was affirmed by the Supreme Court of the State. The contention most earnestly insisted upon by counsel for the Traction Company (which is identical in principle with the defendant's contention here) was that the Transit Company

> "had *no private property in its roadbed* or right of way and that it had not, nor could it have any franchise or vested interest or right in any other than its physical tangible property such as its tracks, ties and other structures

> placed upon and over its roadbed for the purpose of enabling it to maintain and operate its street railway thereon, and that, inasmuch as no part of said property would be taken or used in the construction of plaintiff-in-error's railway in the manner proposed, plaintiff-in-error, under its grant from the Board of Control of the City of Hamilton of August 10, 1901, has the right to enter upon, occupy, and use the roadbed of defendant-in-error in the construction and operation of its proposed road *without legally appropriating such right, and without making or paying any compensation therefor* to said the Hamilton & Lindenwald Electric Transit Company."

In answer to this contention, the Court pointed out that the City's grant to the Transit Company was made pursuant to State authority, that this grant was accepted and acted upon, and that the primary and controlling question in the case was whether "any vested or exclusive property rights were thus acquired." The Court stated that the City could not, and by making the grant to the Transit Company did not, exhaust its powers or deprive itself of making additional grants to other companies for like purposes *in and to the unoccupied portions of the street*, and then proceeded:

> "But it is, we think, equally well settled that where the right is given by ordinance to a street railway company to occupy and use particular parts of certain streets, and the grant so made is accepted and acted upon by the grantee, the City authorities are thereafter, so long as said grant remains in full force, unforfeited anl unrevoked, without right or authority to grant to another street railway company for like use the right to have and occupy without appropriation or the making of compensa-

tion therefor to the first grantee, *precisely the same ground or right of way first granted.* To permit this would be to sanction and allow the impairment of the obligation of an existing contract by subsequent municipal legislation or grant. This may not rightfully be done."

* * * * * * *

"While it is undoubtedly true that a street railway company, under a grant authorizing it to occupy and use certain streets for the purpose of constructing, operating, and maintaining thereon its street railway, acquires no fee in the soil upon which its roadbed is constructed and its ties and tracks are laid, it nevertheless does acquire therein a franchise and easement, which becomes and is its private property; and it has the right, during the life of the grant, to the possession and enjoyment of that franchise and easement without interruption or obstruction from any other company, until such time, at least, as it may voluntarily surrender the same, or be legally divested thereof by an authorized appropriation and the payment of full compensation therefor, as required by the Constitution and Laws of the State of Ohio. The right which the grantee acquires by such grant is more than a mere license. It is a vested property right, in the nature of a franchise or easement in and to the particular portion of the street designated in the grant itself; and such grant carries with it the right of exclusive occupancy and user of that portion of the street for the purposes for which it is granted, in so far as such exclusive occupancy and user are consistent with the welfare and convenience of the general public; and where, as in this case, there are conflicting claims asserted by rival companies, each claiming the same location under grant from the City authorities, and for the same character of use, such claims, even were both grants authorized, should be settled and determined

> by applying the rule that the first of said grantees to rightfully occupy the street has the superior and better claim of right thereon."

The Court then took up the question whether the construction of the Traction Company's railroad in the manner proposed would constitute a "taking" of the Transit Company's property (*i. e.*, franchise) within the Constitutional meaning of that term. It reached the conclusion that such construction *would* constitute such a taking and that the Traction Company had no right to exercise its grant from the City "unless it should first have obtained the right so to do by an authorized appropriation."

This decision of the highest State Court leaves but little to be said here. The plaintiff's direct grant from the State of the right to construct and maintain a hydro-electric plant in the Cuyahoga River is fully as binding and efficacious as the grant which the Hamilton Transit Company received from the City of Hamilton. The place where the plaintiff's plant was to be located, at least when coupled with the plaintiff's adoption of its plans and surveys mentioned above, is quite as definite and precise as the grant of a right to lay tracks in a specified city street. The plaintiff's grant was *accepted and acted upon* when it completed its corporate organization, adopted its locations, and invested its money and changed its position upon the faith of the State's offer, or, to borrow the language of this Court, the plaintiff by its investment irrevocably committed itself to the undertaking, and its acceptance of the State's offer was complete. The grant being thus accepted and acted upon, the plaintiff had acquired "a vested property right in the nature of a franchise or easement in and to the

particular" lands designated in the grant, although it had acquired no fee in the soil upon which its plant was to be constructed. The analogy between the *Hamilton case* and the case here is complete; and upon the authority of this decision of the highest State Court it must be admitted that the plaintiff has a right or franchise of which it could not be deprived unless that right or franchise is duly appropriated by a lawful exercise of the power of eminent domain with the payment of just compensation.

There is, also, a statute of Ohio which expressly recognizes that, at least with respect to those parcels of land against which the plaintiff had condemnation proceedings actually pending, the plaintiff has a property right which cannot be defeated or interfered with. That statute is Section 11,300 of the Ohio General Code which provides as follows:

> "Section 11,300. When the summons has been served or the publication made, the action is pending so as to charge third persons with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of the action, *as against the plaintiff's title.*"

The summonses had been served in the plaintiff's actions, and by the express language of the statute "the plaintiff's title" could not be interfered with. Obviously, the statute recognizes the existence of a title as to which interference was prohibited. The right of action itself is property.

> *Pritchard* v. *Norton,* 106 U. S., 132.
>
> *Searl* v. *School District,* 124 U. S., 197, 199.
>
> *Cincinnati* v. *Louisville, etc., Co.,* 223 U. S., 390, 400.

But notwithstanding this express decision of the highest State Court and this State statute, the plaintiff's claim that it has such a right or franchise has been denied by the court below; and if this denial be sustained by this Court the consequences are grave indeed, not only for this plaintiff, but, also, for every other person or corporation expending money for the erection of any public utility whatever, and for the large portion of the citizens of the country who are dependent for light, heat, power, water, telephones, telegraphs, and railroads, upon the activities of these private companies undertaking the public service. For if this plaintiff—having performed all the statutory conditions, made its expensive surveys, adopted its plan of development, located the precise lands to be covered thereby, and in fact done everything preliminary to actual construction *except acquire absolute ownership of the soil from the private owners*—had not acquired such a right or franchise, then this Court must answer the question: *When is such franchise acquired?* Is it when the soil is actually acquired and paid for? Is it when the proposed improvement is actually constructed? Is it when the contemplated service is actually commenced? If this be so, *then no right to appropriate,* no right to erect or construct dams or string wires or lay pipes, can even be acquired: the State's offer of the right to build dams in a particular river cannot be accepted at all, and the only thing which can be acquired is the right to maintain a plant already constructed. There is no middle ground upon which to stand: one doctrine or the other must be applied; and if the plaintiff's claim here be not sustained, then no right to acquire the lands necessary to make the State's grant useful or effective could vest in it

during all the long years necessary for the acquisition of title and the construction of the physical works; and investors in such enterprises must take their chances as to what may happen during that interim. It is needless to say that if that be the law, no investments of this character will ever be made.

We confidently believe, however, that, even aside from the Ohio decision and statute cited above, the answer to the questions here has been already given by this Court in its recent decisions in *Russell* v. *Sebastian*, 233 U. S., 195, and *New York Electric Lines Co.* v. *Empire City Subway Co.*, 235 U. S., 179, 193, and that those decisions are controlling here. But reserving for subsequent reference the numerous cases in which this Court has so clearly announced the doctrine that legislative provisions like the Ohio statute here involved constitute offers by the State which are converted by acceptance into binding contracts and vested property rights within the meaning of the Federal constitution and that "the grantee is thus protected in starting the enterprise," we call attention first to a few of the numerous cases in which the courts throughout the country, with impressive frequency and unanimity, have held that when a corporation of this kind has adopted a definite plan and *located* the lands which it proposes to utilize in its undertaking it has secured *a vested and exclusive right* to appropriate and utilize the lands so designated and located. FOR IT IS THIS INTANGIBLE RIGHT ACQUIRED BY GRANT FROM THE STATE THAT CONSTITUTES THE PROPERTY OF WHICH WE CLAIM THE PLAINTIFF IS BEING DEPRIVED, AND NOT THE TITLE OF THE PRIVATE OWNERS TO THE TANGIBLE REALTY DESCRIBED IN THE PLAINTIFF'S SURVEYS.

The lower Court said (210 Fed., 528 Rec., p. 35):

> "The Constitution of Ohio, Art. 1, Sec. 19, provides that, before property is taken for public use, compensation shall first be made. There is no allegation that the plaintiff has taken property in this manner. A consideration of Sections 11,042, 11,046, 11,057, 11,059, 11,065, 11,068, 11,070, 11,072 of the Ohio General Code indicates that no property is appropriated and no rights acquired under this Ohio law until compensation is made in pursuance of a judgment of a Court after the verdict of a jury."

The sections of the Ohio Code thus referred to are all contained in the chapter prescribing the method of condemning or appropriating the title of the private owner. With that method we are not here concerned—that is a question between the plaintiff and the private owner, and cannot affect the issue between the plaintiff and the outside third party rival and competitor, who is the defendant in this suit. It may be noted in passing, however, that the sections so referred to simply give effect to the plain command of the Ohio Constitution that every appropriator of private property, including the defendant as well as the plaintiff, must *pay first and take afterwards:* they have no bearing upon the contention that although the plaintiff had not acquired the titles of the private owners it nevertheless had acquired what is termed in one of the cases, *"the prior right to pay the damages to the owner,* and thereby acquire a perfected right to the easement" (see *Sioux City, etc., Co.* v. *Chicago, etc., Co.*, quoted *infra*). That this right, being a special privilege acquired by grant from the sov-

ereign power, often has great value and is uniformly protected and sustained by the Courts, we now proceed to show.

In *Denver & Rio Grande R. R. Co.* v. *Arizona & Colorado R. R. Co.*, 233 U. S., 601, this Court affirmed a judgment enjoining one railroad company from interfering with the located line of another railroad company, the Court saying that it saw no sufficient reason "for reversing the decision of the local Court that *a company is entitled to protection as soon as its final location is complete.*" In rendering the decision so affirmed (16 N. M., 281, 290, 291), the local Court simply followed and applied *Sioux City & D. M. Ry. Co.* v. *Chicago, etc., Co.*, 27 Fed., 770, and *Railway Co.* v. *Alling*, 99 U. S., 463, which are two of the many cases establishing in approximately twenty-two States of the Union the rule which, as stated above, this Court sees no reason for reversing. Although most of these cases relate to the location of railroad routes and involve to some extent the construction of local statutes, they nevertheless rest upon a broad general principle, which is not only just and right, but of absolute practical necessity if public utilities are to be constructed, and which is applicable to all corporations exercising the power of eminent domain for the purpose of acquiring property for a public use. Indeed, the reasons at the basis of the doctrine that the definite location of a railroad route establishes a property right which must be respected by other corporations, including municipalities, applies with much greater force to the situation of plaintiff. A railroad, if part of a projected route is taken from it, is usually still able, by the construction of somewhat different lines, to

carry on its business of railroad operation between the desired points. Its corporate purposes may still be fulfilled. But a hydro-electric corporation must use the water of the river described in its articles of corporation or cease business. The proposed uses by the plaintiff and defendant are wholly antagonistic, and the perfection of use by the City will utterly destroy not only the use by the plaintiff, but, also, the plaintiff's entire existence. It cannot adopt an alternative route. It cannot move the river, or if it could, it would be destructive of the defendant's use.

In *Sioux City, etc., Co.* v. *Chicago, etc., Co., supra*, which is a frequently cited and uniformly approved case, Judge SHIRAS lays down the rule which so far as we know has never been rejected. Many of his remarks are peculiarly appropriate because of the view taken below that no rights were acquired until the title of the owner of the soil was acquired and paid for:

> "The question * * * really involves the point whether it appears from the allegations of the bill and answer that complainant has the better right to the occupancy of the premises in dispute. On part of complainant, it is argued that the conveyances to it give it the absolute title to the right of way, because, when they were executed, the defendant company *had not paid the damages to the owners of the land;* that payment is necessary, under the statutes of Iowa, to create a right in the railway company as against the owner of the land; and that until payment is made the owner's control over his property is absolute, and he can convey the same, or a right of way over the same, to any railway company. On part of defendant it is claimed that the permanent location of a line of rail-

way by survey and marking upon the ground must be deemed to be the beginning of the building of the road; and that the right thus acquired will not be lost, provided the construction of the road is resumed within five years, that being the limitation fixed by Section 1260 of the Code of Iowa.

"That the survey and location of a railway is part of the work of constructing the same, is held in (Chicago, etc., Co. *v.* Grinnell, 51 Iowa, 476, 482, 1 N. W., 712).

"It is certainly equitable that a company, which in good faith surveys and locates a line of railway, and pays the expense thereof, should have prior claim for the right of way for at least a reasonable length of time. *The company does not perfect its right to the use of the land, as against the owner thereof, until it has paid the damages, but, as against a railroad company, it may have a prior right, and better equity.* The right to the use of the right of way is a public, not a private, right. It is, in fact, a grant from the State, and *although the payment of the damages to the owner is a necessary prerequisite, the State may define who shall have the prior right to pay the damages to the owner, and thereby acquire a perfected right to the easement.* The owner cannot, by conveying the right of way to A, thereby prevent the State from granting the right to B. *All that the owner can demand is that his damages shall be paid, and, subject to the right of compensation to the owner, the State has the control over the right of way, and can, by statute, prescribe when, and by what acts, the right thereto shall vest,* and also what shall constitute an abandonment of such right."

* * * * * *

"The injustice and injury to private and public rights alike, which would arise, were it held that, after a company has duly surveyed and located its line of railway, and is in good faith preparing to carry forward

the construction of its road, some other company may, by private purchase, procure the right of way over parts of the located line, and either prevent the construction of the road, or extort a heavy and exorbitant payment from the company first locating its line, as a condition to the right to build the same as originally located, are strong reasons for holding that the first location, if made in good faith, and followed up within a reasonable time, may confer the prior right, even though a rival company may have secured the conveyance of the right of way by purchase from the property owners after the location, but before the application to the Sheriff for the appointment of commissioners."

* * * * * *

"If it be true that complainant, by making the purchase of the realty over which the defendant's line is located, has the right to prevent the completion of the road, then it would be in the power of any company to prevent the construction of competing lines by simply purchasing portions of the realty over which the line is located and placing thereon its own track."

In *Chesapeake & Ohio Ry. Co.* v. *Deepwater Ry. Co.*, 57 W. Va., 641, 50 S. E., 890, the highest Court of that State examined the question fully upon principle, and also reviewed a large number of the authorities, and then said (57 W. Va., 666):

"This review of the authorities clearly establishes the following principles: First. When the statute does not make the filing of a map or plat of a railroad location a prerequisite to the adoption of it, an appropriation of it may be made without the filing of such maps. Second. *The beginning of condemnation proceedings against the land owner is not a prerequisite to the acquisition of a right of way against third persons* and rival

companies. Third. A mere survey made by the engineers of the railroad company, not adopted or determined upon by the corporation itself, through its Board of Directors, or otherwise, as the location of the route does not amount to an appropriation, giving priority of right as against third persons. Fourth. A survey staked out upon the ground as a center line, a preliminary line, or as an actual location, whether delineated on paper or not, if adopted by the corporation, as aforesaid, is a location within the meaning of the statute, and *the company first making such location has a right to it superior to that of any other company.* Fifth. A survey made by promoters of a railroad corporation for its purposes before the company is organized, or by an existing corporation for an extension of its road, before filing in the office of the Secretary of State a certificate of extension, may be adopted after incorporation or the filing of the certificate, as the case may be. Sixth. A location of a line, contemplated by original articles of incorporation, cannot be made before incorporation, nor can the location of a line contemplated by an extension be made before the certificate of extension has been filed as required by law. Seventh. A railway company may begin the work of location on any part of its contemplated route, and *a location of a part only of its road, may be held against a rival company, seeking the same location, as long as such locating company manifests good faith by the diligent prosecution of the work contemplated by its organization.*"

In *Williamsport & North Branch R. Co.* v. *Philadelphia & Erie R. Co.*, 141 Pa., 407, 12 L. R. A., 220, which is everywhere recognized as a leading case, the action was by one corporation to enjoin another from locating its railroad upon land al-

leged to have been previously appropriated by the plaintiff. The Court held that a railroad is located so as to exclude the appropriation of the land selected by other persons *when a definite location has been adopted by the action of the company.* In so holding the Court said:

> "*The act of location is an appropriation of private property by virtue of the right of eminent domain* with which the State has invested the railroad company, either by the act of incorporation or by virtue of general laws.
>
> "The requisites of a valid location may be considered, first, with reference to the private owners upon or over whose lands the location is made, and next, with reference to third parties and other corporations.
>
> "The successive steps contemplated by the act of 1849 and subsequent legislation as necessary to vest a title to the roadway in the corporation are these:
>
> "First. A preliminary entry on the lands of private owners for the purpose of exploration. This is made by engineers and surveyors who run and mark one or more experimental lines, and who report their work with such maps and profiles as may be necessary to present it properly to the company that employs them.
>
> "Second. A selection and adoption of a line, or one of the lines so run, as and for the location of the proposed railroad. This is done by the corporation and it requires the action in some form of the Board of Directors. This makes what was before experimental and open a fixed and definite location. It fastens a servitude upon the property affected thereby and so takes from the owner and appropriates to the use of the corporation.
>
> "Third. Payment to the owner for what is taken and the consequences of the taking, or

security that it shall be made, when the amount due him is legally ascertained.

"The title of the owner is not divested until the last of these steps has been taken. *Levering* v. *Philadelphia, G. & N. R. Co.*, 8 Watts & S., 450; *McClinton* v. *Pittsburgh, Ft. W. & C. R. Co.*, 66 Pa., 404; *Dimmick* v. *Brodhead*, 75 Pa., 464; *Buffalo, N. Y. & Phila. R. Co.* v. *Harvey*, 107 Pa., 319; *Gilmore* v. *Pittsburgh, V. & C. R. Co.*, 104 Pa., 275.

"As against him the corporation can acquire only a conditional title by its act of location, which ripens into an absolute one upon making compensation. *As to third persons and rival corporations, however, the action of the company adopting a definite location is enough to give title.* For this reason in several of the United States provision is made by law for recording the action of the company and the line adopted by it, so as to give notice to the public, and to settle questions of priority of title. We have no such statute and the action of the company must be proved by other competent evidence. *Heise* v. *Pennsylvania R. Co.*, 62 Pa., 72. But when proved it has the same effect upon all interested as though it had been recorded. It settles the date of actual appropriation, and shows the exact location of the line of the road proposed."

The statute of Ohio does not require the filing of any map of the lands located and hence the case just cited is precisely applicable here.

In *Rochester, Hornellsville & Lackawanna R. R. Co.* v. *New York, Lake Erie & Western R. R. Co.*, 44 Hun, 206, 110 N. Y., 128, the plaintiff company sought to enjoin the defendant from interfering with a strip of land covered by the map of the plaintiff's proposed route, which had been filed in accordance with the statute. (Note again that the

Ohio statute does not require that any map be filed.) In granting an injunction the General Term of the New York Supreme Court said (44 Hun, p. 206):

> "Under the general railroad act, *when a corporation has been organized in compliance with the conditions of the statute and has made a map and profile of the route intended to be adopted by the company,* duly certified and filed as required by the twenty-second section *it has acquired a vested and exclusive right to build, construct and operate a railroad on the line which it has adopted,* subject to the right of other railroad companies to cross its route and lands in the way and manner and for the purposes provided by law. * * * The plaintiff has a franchise conferred upon it by the Legislature to construct its road over the established line."

In affirming this decision, the Court of Appeals, in a unanimous opinion, said (110 N. Y., 132-134):

> "In their opinion the General Term considered that a case had been made for the allowance of a preliminary injunction and that the same should be continued *pendente lite*, on the ground that the plaintiff had acquired *a vested and exclusive right to construct and operate its railroad on the line it had located.* We think the General Term were right in the view they took of the matter.
>
> *"The plaintiff, by its organization, under the general railroad act of 1850, became possessed of the franchise to construct and operate a railroad between the terminal points named in its articles, over such a line of route as it should elect.* When the initial steps, pointed out in the twenty-second section of the act had been taken, there only remained for the plaintiff to acquire through purchase, or through proceedings *in invitum*, the right of way over

the lands through which the line of route had been surveyed. * * *

"Clearly there is involved in these provisions the intention of the Legislature that * * * the lands over which the company's route is located shall be subjected to the right of the company thereafter to construct thereon. * * * *This right to locate its line of road, at its election, is delegated to the corporation by the sovereign power;* as is the right subsequently to acquire, *in invitum*, the right of way from the landowner and any land needed for the operation of its road. *In this sovereign power is the source of the franchise*, which the corporation possesses to construct and operate a railroad, and its grant is for public and not for private purposes. Public considerations enter into the grant of the franchise and public policy favors the enterprise for the public convenience and use. When, therefore, a corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of its road, and has given the required notice to all persons affected by such construction, and no change of route is made, as the result of any proceeding instituted by any landowner or occupant, in our judgment, *it has acquired the right to construct and operate a railroad upon such line; exclusive in that respect as to all other railroad corporations and free from the interference of any party.* By its proceedings it has impressed upon the lands a lien in favor of its right to construct, which ripens into title through purchase or condemnation proceedings. We could not hold otherwise without introducing confusion in the execution of such corporate projects and without violating the obvious intention of the Legislature.

"The plaintiff's franchises were invaded and its enjoyment of the statutory privileges disturbed by the action of the defendant company, in so building tracks upon plaintiff's

line of route as to obstruct and interfere with its proposed construction. The remedy by injunction was clearly available to the plaintiff on principles of equity jurisprudence (Story's Eq. Jur., Sec. 927; *Osborn* v. *U. S. Bank*, 9 Wheat., 740; *Croton Turnpike Co.* v. *Ryder*, 1 Johns. Ch., 611; *T. & P. R. R. Co.* v. *W. & V. R. R. Co.*, 12 Phila., 642; *Contra Costa R. R. Co.*, v. *Moss*, 23 Cal., 323; *Boston, etc., R. R. Co.* v. *Salem, etc., R. R. Co.*, 22 Cush., 27).

"The able opinion at General Term, delivered by Barker, J., renders further consideration of the points in this case unnecessary."

Again, in *Suburban Rapid Transit Co.* v. *Mayor, etc.*, 128 N. Y., 510, the New York Court of Appeals applied the same principle to an attempt by a city, under authority from the State, to take for park purposes a strip of land adopted as a railroad route though the railroad company had not yet acquired title to the land by condemnation proceedings. That is precisely the situation here, and what the Court said is appropriate:

"The question, which is presented to us, relates to the effect of the passage of the New Parks Act of 1884, upon any then existing franchises and rights of the plaintiff corporation. If by its organization, under the Rapid Transit Act of 1875, it had become *possessed of the franchise to construct, operate and maintain its railroad over the routes designated and located* by the Mayor's Commissioners, which operated to vest in it a legal right to have the lands affected by the designation, then I think we must hold that the Act of 1884 was inoperative to take away, or to authorize the deprivation, or curtailment of such a right.

"The text of the opinions rendered in the Supreme Court is that the plaintiff, at the time

of the passage of the New Parks Act in 1884, had acquired *no actual ownership* in the land in question and *had not commenced the proceedings to acquire such ownership.* Therefore, it was considered that by the Act of 1884, there was an exclusive devotion of the land to strictly park purposes, which was a use inconsistent with a railroad use, and that any inchoate right, previously acquired by the plaintiff, to proceed to the acquisition of the land for the construction of its railway was defeated.

"The learned Justices seem to have fallen into two errors. They have given to the language of the New Parks Act a construction, by which the particular tract of land, designated for St. Mary's Park, is appropriated to such a purpose to the exclusion of the plaintiff's railway, and they have *failed to recognize the acquisition and possession by the plaintiff of an indestructible franchise, in the exercise of which the condemnation of the land was but an incidental feature* and in furtherance of a scheme which the organization of the corporation had given vitality to and to which, in the view I take, the land had become subjected by the paramount exercise of sovereign power. The learned Justice at Special Term admitted that, at the time of the passage of the New Parks Act of 1884, the lands through St. Mary's Park 'had been lawfully designated under a general act as part of the general route of the plaintiff's railroad;' but because not 'devoted to a railroad use actually in exercise,' he thought that 'there was no actual prior use to be considered by the Legislature.' "

After then referring to the statutory provisions under which the plaintiff was incorporated, the Court continued (p. 519):

"It seems to me that when the proceedings instituted under the Rapid Transit Act of

1875, have terminated in the *organization of a corporation, which must construct, maintain and operate a railroad upon certain routes prescribed and located by commissioners,* as the public agents directed by the act to be appointed for that purpose, *the lands necessary for the purpose have been as much appropriated and devoted to that exclusive use by sovereign power, as though it had been so declared in some special enactment.* When the route or routes were located, upon which the railroad of the new corporation should be constructed, what other legal effect could follow except a subjection of the land affected to this species of public use, as through the exercise of paramount right?

"The subsequent purchase, or condemnation of the title to the lands, in the course of the railroad construction, was merely incidental, and was necessary in order to compensate property owners for the land taken, and to effect a transfer of the legal title. *The right which the plaintiff acquired to construct and operate the railroad upon the route described in its articles of association lacked nothing for its efficacy or completeness.* It had become an obligation, and was one of the unalterable conditions and a fixed public feature of the corporate existence. When to it were subsequently added the consents of municipal authorities and of property owners, was any feature wanting to the fullest franchise in such respects? To say that the right to appropriate the land on the designated routes for railroad uses was not vested, but merely inchoate, in my judgment would be a great misapprehension of the effect and value of formal proceedings conducted under legislative authority and direction, and of the formal consents of the public authorities to the projected line. * * * *How can a franchise so conferred by the Legislature be deemed inchoate and defeasible?* Is not the possession

an element of the security upon which capital has been subscribed and loans have been made to the company? The construction of this railroad had been proceeded with upon the plans of the Commissioners and with reference to the projection of the route upon the line designated and consented to. The company's funds had been expended with reference to its road being constructed upon the plans and routes designated by the public agents. In the case of the Broadway Surface Railroad (*People* v. *O'Brien*, 111 N. Y., 1), the corporate franchise, acquired under the authority of the Legislature and the consents of the municipal authorities, to lay tracks and to run cars upon Broadway, was held by us to be a right indestructible by the Legislature, and to constitute property in the highest sense of that term.

"I think we must conclude that the statutory proceedings, which resulted in the organization of the plaintiff corporation, *had the effect of vesting in it the absolute and exclusive franchise to build upon the route located for it*, and to the use of which the lands were devoted, through the exercise of the paramount right of sovereign power; which franchise was unimpaired, with respect to the right to take and use the land in question, by the fact that the work of actual construction had not reached it, at the time the Legislature passed the act for the new parks."

What language can better fit the case at bar? Is there any doubt that the New York Court stated correct principles? This Court has cited the case several times. And if its principles be correct, why do they not apply here? There is not a distinguishing feature between that case and this.

It is true that in the subsequent case of *People* v. *Adirondack Ry. Co.*, 160 N. Y., 225, the New

York Court gave utterance to a *dictum* to the effect that there is "no property in a naked railroad route, existing on paper only, that the State is obliged to pay for when it needs the land covered by that route for a great public use, and its officers are authorized to act by appropriate legislation." But it is also true that in that case it did not overrule, but distinguished and recognized as binding the decisions referred to above, and expressly stated that although the location of a route gave no right as against the State, yet

> "as against all other railroad companies *and as against all other creatures of the State, empowered to use the right of eminent domain,* it gave the exclusive right to occupy the particular strip of land for railroad purposes until the Legislature authorized it to be devoted to some other public use."

As applied to the case at bar, therefore, all the New York cases unite in sustaining the plaintiff's prior right as against the defendant city—a lesser "creature of the State" which has no special mandate or authorization from the Legislature to take the particular lands to which the plaintiff's rights relate.

It is true, also, that in *Ramapo Water Co.* v. *New York*, 236 U. S., 579, which involved the application of New York statutes, this Court held that the mere filing of maps gave that company no vested rights which survived the repeal of the statutes under which the company acted, and intimated, also, a doubt as to whether those statutes really authorized an appropriation of the extensive areas of land which were there claimed. But clearly that decision can have no controlling effect here. In the case at bar the statute from which

this plaintiff derives its rights and under which it is proceeding is still in full force and effect. The State of Ohio has made no attempt to withdraw the plaintiff's rights and powers by exercising any reserved right to alter, amend, or repeal its laws; the plaintiff is still prosecuting and exercising its rights and powers and there is no question as to its right to do so; and the plaintiff here has furthermore unquestionably performed every statutory condition and actually commenced the acquisition of land by the institution of its condemnation proceedings. In short, the plaintiff here stands before this Court as a duly authorized agent and representative of the State, with the State's mandate and authority—its contract with the State—in its hands; and the only question here is whether the defendant, another agent of the State, may, under a mere general authority to provide itself with water, so exercise its discretion of selection of sources as to defeat absolutely the State's own prior grant of rights and powers to the plaintiff.

In *Nicomen Boom Co.* v. *North Shore Boom Co.*, 40 Wash., 315; 82 Pac., 412, the Supreme Court of Washington, affirming the principles of the cases already cited, sustained the right of one boom company to enjoin another from constructing a boom within the limits of the territory included in the plat and survey filed by the plaintiff as showing the shore lines, lands, and waters it proposed to appropriate for its corporate purposes. The Court said (p. 325):

> "Under legislative schemes for the location of railroad lines which are initiated by the filing of plats of location, it is held that compliance with the law in that particular secures to

the locating company the right to construct and operate a railroad upon such line, exclusive in that respect, as to all other railroad corporations, and free from the interference of any party. *The right to locate its line of road in the place of its selection is delegated to the corporation by the sovereign power.* The further right to subsequently acquire, *in invitum,* the right of way and necessary lands for operation of the road from the land owners is likewise delegated. *The source of the franchise is in the sovereign power, which power confers the franchise upon the corporation as its delegated representative,* and the grant is for the public, and not for private, purposes. * * * It is further held that, when a franchise has been thus conferred, no other railroad company may acquire title to the lands within such a location, or construct a road thereon, to the exclusion of the right of the first locating company to acquire such title *in invitum,* and to construct its road upon the lands. Injunction has also been adopted as the proper remedy to prevent such interference. In support of the above propositions, which we have stated generally, we cite the following authorities: *Rochester, etc., R. Co.* v. *New York, etc., R. Co.,* 110 N. Y., 128, 17 N. E., 680; *Barre R. Co.* v. *Granite R. Co.,* 61 Vt., 1, 17 Atl., 923; 15 Am. St., 877; 4 L. R. A., 785; *Sioux City, etc., R. Co.* v. *Chicago, etc., R. Co.,* 27 Fed., 770; *Morris, etc., R. Co.* v. *Blair,* 9 N. J. Eq., 635; *Titusville, etc., R. Co.* v. *Warren, etc., R. Co.,* 12 Phila., 642; *Williamsport, etc., R. Co.* v. *Philadelphia, etc., R. Co.,* 141 Pa. St., 407, 21 Atl., 645, 12 L. R. A., 220; *Railway Co.* v. *Alling,* 99 U. S., 463"

After answering certain contentions of the respondent, the Court proceeded:

"Applying the rule followed in the railroad case, appellant had the *right,* after filing its

> plat of location, *to acquire the title to the lands within the limits of its location.* It was *an absolute right which it could enforce by condemnation proceedings* to the exclusion of any other boom company that might seek to appropriate the same land."

In

> *Lewis on Eminent Domain*, Sec. 503, 504;
> *Elliott on Railroads*, Sec. 921, 927;
> 33 *Cyc.*, 111, 127, 137, 138, 139;

and other general authorities, the principle for which we contend is stated as the law, and hosts of cases are cited. From these it appears that from the earliest times to the latest, the doctrine has been followed. It has, indeed, become more than a doctrine—it has become a rule of property upon which all eminent domain corporations rely and have relied for years.

Whatever difference there may be between the location of a railroad route and the plaintiff's location of the lands which it would use for its improvements is a difference which but calls more loudly for the application of the rule of the railroad cases to the case at bar. The statute under which the plaintiff acted specifically refers to "the rivers of the State." The plaintiff's articles of incorporation specifically state that its purpose is to develop the Cuyahoga River between certain points mentioned. This of itself makes the thread of the stream between these *terminii* the scene of the plaintiff's development and is *per se* quite as definite as a located railroad route. But the plaintiff, as already stated, is not required to rely upon its articles of incorporation as a location. It has gone further and adopted, in the language

of the Ohio statute, a "specific description" of each parcel of land it is to occupy. To say that such adoption does not fasten upon those parcels a servitude in favor of the plaintiff's right to acquire and use which cannot be interfered with by third persons, is to deny any effect whatever to the statute, to the plaintiff's charter, and to its acts thereunder. We cannot believe that this Court will do this.

POINT IV.

The right or franchise so acquired by the plaintiff constitutes a contract and property within the meaning and protection of the contract and due process clauses of the Federal Constitution.

In *Monongahela Navigation Co.* v. *United States*, 148 U. S., 312, 344, 345, this Court said that a franchise to receive tolls "was as much a vested right of property as the ownership of the tangible property" and could not be taken for a public use without just compensation, and that such compensation required "payment for the franchise to take tolls as well as for the value of the tangible property."

In *Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19, this Court, in referring to the right of the appellee there to use certain streets for the purpose of laying mains and service pipes in order to furnish gas to the city and its citizens, said (p. 44):

> "It cannot be disputed that franchises of this nature are property and cannot be taken or used by others without compensation."

And it thereupon proceeded to find that the

value of such franchises amounted to millions of dollars, although it was admitted that they had never cost a single penny.

In *Louisville* v. *Cumberland Telephone Co.*, 224 U. S., 649, a city ordinance conferring a street franchise was held to constitute a contract, and the Court said:

> "In considering the duration of such a franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, *would operate to nullify the charter itself, and thus defeat the State's purpose to secure a telephone system for public use.* For, manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at will of the city and the utility and value of the entire plant be thereby destroyed. Such a construction of the charter cannot be supported, either from a practical or technical standpoint."

In like manner, to say that the plaintiff's right to appropriate and use the waters of the Cuyahoga River is not a contract or property and may be destroyed at the will and pleasure of the defendant, would nullify the plaintiff's charter and its acts and expenditures thereunder and utterly defeat the State's purpose to secure a hydro-electric plant for public use.

In *Grand Trunk Western Ry. Co.* v. *City of South Bend*, 227 U. S., 544, the City attempted to prevent the laying of a double track under an ordinance

passed many years before giving the company the right to lay such track, and in sustaining the right to an injunction, the Court said:

> "It is said, however, that even if the City could not prevent the use of the rails already laid, it could repeal *so much of the ordinance as related to that part of the street on which the double track had not been actually built.* But this was not a grant of several distinct and separate franchises, where the acceptance and use of one did not necessarily execute the contract as to others not connected with the main object of the ordinance and not at the time directly within the contemplation of the parties. *Pearsall* v. *Great Northern R. R.*, 161 U. S., 646, 673. This franchise was single and specific, and when accepted and acted upon became binding—not foot by foot, as the rails were laid—but as an entirety. * * *
>
> "The ordinance passed in pursuance of the Indiana statute was an entirety. When accepted it became binding in its entirety. If the City has the right to repeal the specific provisions of the contract, it has the like right to repeal the more general grant to lay a single track. If South Bend can do so, every other municipality having granted like rights, under similar ordinances, and affecting every line of railway in the country, can repeal the franchise to use double or single track. On the ground of congestion of traffic, the State's grant and command to operate a continuous road could be nullified by municipal action, to the destruction of great highways of commerce, similar in their nature to the street itself. Such consequences, though improbable, are rendered impossible by the provision of the Constitution of the United States prohibiting the impairment of the obligation of a contract by legislation of a State, whether acting through a General Assembly or a municipality exercising delegated legislative power."

So, in the case at bar, the plaintiff's right or franchise to appropriate the waters of the Cuyahoga and utilize that river for the development of hydro-electric power, was single and specific, and became binding, not step by step as the necessary parcels of land were purchased or condemned, but as an entirety; and if the waters of that river can now be taken by the defendant, then the State's grant and command to construct and maintain a complete plant for turning these waters into useful energy can be and is nullified by municipal action, to the destruction of an instrumentality the value and importance of which is already established and recognized, and which is fast becoming as much of a "highway of commerce" as railroads themselves.

In *Boise Water Co.* v. *Boise City*, 230 U. S., 85, 90, the Court said:

> "The right which is acquired under an ordinance granting the right to a water company to lay and maintain its pipes in the streets is a substantial property right. It has all of the attributes of property. It is assignable and will pass under a mortgage sale of the property and franchises of the company which owned it. Dillon's Mun. Corp., 5th Ed., Sec. 1265; *Detroit* v. *Detroit Street Railway*, 184 U. S., 368, 395, 396; *Louisville* v. *Cumberland Tel. & Tel. Co.*, 224 U. S., 649, 661; *Detroit Railway Co.* v. *City of Detroit*, 64 Fed. Rep., 628. The grant was made in contemplation of the investment of large capital in the construction of a system of water works for the permanent supply of the City with water. The presumption is that no such enterprise would have been entered upon if the street easement was subject to immediate revocation."

The same presumption applies here with equal

if not greater force, that the plaintiff would never have been organized and it would never have attempted to perform its undertaking if its "right to appropriate" the waters of the Cuyahoga River were subject to such interference by other creatures of the State that the right could be nullified by the action of some city council.

In *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S., 58, it was again held that a municipal ordinance granting to a corporation qualified to carry on a public business the right to use the streets for that purpose is "the granting of a property right" within the meaning of the Constitution.

Another peculiarly appropriate case—one which is controlling here—is *Russell* v. *Sebastian*, 233 U. S., 195, which involved the rights of the Economic Gas Co., under a provision of the Constitution of California of 1879, which provided that in any city where there were no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual or any company duly incorporated under the laws of the State for such purpose, should, under the direction and general regulations of the municipal authorities, have the privilege of using the public streets and thoroughfares thereof and of laying down pipes and conduits therein and connections therewith so far as might be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and other purposes, upon the condition that the municipal government should have the right to regulate the charges thereof. The Gas Company was organized in 1909 to manufacture and distribute gas within the City of Los Angeles for lighting purposes. In 1911

the State Constitution was amended, and under the authority of such amendment the City of Los Angeles made an ordinance providing that no one should exercise any franchise or privilege to lay or maintain pipes or conduits in the streets for conveying gas or water without obtaining *a grant from the city.* It was contended that the ordinance and the constitutional amendment upon which it rested, so far as they interfered with the extension by the company of its lighting system, impaired the obligation of the company's contract with the State, and also deprived it of its property without due process of law in violation of the United States Constitution; and that contention was sustained by this Court.

The provision of the Constitution of 1879 was referred to by the Court as an *offer by the State*, which, though no formal or written acceptance was provided for, could nevertheless be accepted in fact; and at page 204 the Court said:

> "That the grant, resulting from an acceptance of the State's offer, constituted a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this Court."

The learned Justice who delivered the opinion then stated that the controversy in the case before him related to the extent to which the grant had become effective through acceptance; that it was not contended that the change in the Constitution could disturb the company's rights in the streets used previous to the amendment; but that it was insisted that such *actual user* measured the range of the acceptance of the grant and hence defined

the limits of its operation. In rejecting this contention this Court stated, among other things, as follows:

> "There is no ambiguity as to the scope of the offer. *It was not simply of a privilege to maintain pipes actually laid, but to lay pipes so far as they might be required in order to effect an adequate distribution* * * *.
>
> "The breadth of the offer was commensurate with the requirements of the undertaking which was invited. The service to which the provision referred was a community service. It was the supply of a municipality—which had no municipal works—with water or light. This would involve, in the case of waterworks, the securing of sources of supply, the provision of conduits for conveying the water to the municipality, and the permanent inve .ent in the construction of reservoirs with suitable storage capacity; and, in the case of gasworks, the establishment of a manufacturing plant on a scale large enough to meet the demands that could reasonably be anticipated. * * * It is not to be supposed that it was expected that waterworks and gasworks of the character required to supply cities would be erected without grants of franchises to use the streets for laying the necessary distributing pipes * * *.
>
> "In deciding upon the policy of making these direct grants it was for the State to determine their terms and their scope; it could have imposed whatever conditions it saw fit to impose. But it did not attempt to confine the privilege to particular streets or areas, or to make the laying of the necessary pipes conditional upon the renewal of the offer street by street, or foot by foot, as the pipes were put in the ground * * *. The individual or corporation undertaking to sup-

> ply the city with water or light was put in the *same position as though such individual or corporation had received a special grant of the described street rights in the city which was to be served.* Such a grant would not be one of several distinct and separate franchises. *When accepted and acted upon it would become binding—not foot by foot, as pipes were laid—but as an entirety, in accordance with its purpose and express language.*"

Then answering the contention that the only way the offer could be accepted was by a use of the streets and that for this reason the rights of the company could not extend beyond the length of its pipes in place, the Court said:

> "But this is to say that the offer as made could not be accepted at all; that the right to *lay* pipes could not in any event be acquired. It is to assume, despite the explicit statement of the constitutional provision, that the investment in extensive plants—in the construction of reservoirs, and in the building of manufacturing works—was invited without any assurance that the laying of the distributing system could be completed or that it could even be extended far enough to afford any chance of profit. It would be to deny the right offered, although essential to the efficacy of the enterprise, and in its place to give a restricted and inadequate right, which was expressed.
>
> "In view of the nature of the undertaking in contemplation, and of the terms of the offer, we find no ground for the conclusion that each act of laying pipe was to constitute an acceptance *pro tanto*. We think that the offer was intended to be accepted in its entirety as made, and that *acceptance lay in conduct committing the person accepting to*

the described service. The offer was made to the individual or corporation undertaking to serve the municipality, and when that service was entered upon and the individual or corporation had *changed its position beyond recall*, we cannot doubt that the offer was accepted (*City Railway Co.* v. *Citizens R. R. Co.*, 166 U. S., 557, 568; *Grand Trunk Rwy. Co.* v. *South Bend, supra*). In this view, the grant embraced the right to lay the extensions that were needed in furnishing the supply within the city."

The Court also referred, with approval, to *People ex rel. Woodhaven Gas Co.* v. *Deehan*, 153 N. Y., 528, as holding that a grant of authority to lay pipes and conduits for conveying gas through the streets of a town so as to render service to the people of the town, *extended as a property right not only to the streets then existing but also to those subsequently opened.* The Court then concluded as follows:

> *"The company, by its investment, had irrevocably committed itself to the undertaking and its acceptance of the offer of the right to lay its pipes, so far as necessary to serve the municipality, was complete.*
>
> "We conclude that the constitutional amendment of 1911, and the municipal ordinances adopted in pursuance thereof, were ineffectual to impair their right, and that the company was entitled to extend its mains for the purpose of distributing its supply to the inhabitants of the city subject to the conditions set forth in the constitutional provision as it stood before the amendment."

Finally, in *New York Electric Lines Co.* v. *Empire City Subway Co.*, 235 U. S., 179, this Court had before it a case in which the company claim-

ing to have a contract had not in any way entered upon the performance of its public service or made any use whatever of the rights offered, and in which the State Court had held that for this very reason no contract or other right constituting property within the meaning of the Constitution had yet come into existence. This Court rejected the view so expressed by the State Court, and said:

> "These municipal consents are intended to afford the basis of enterprise with reciprocal advantages, and it would be virtually impossible to fulfill the manifest intent of the Legislature and to secure the benefits expected to flow from the privileges conferred, if, in the initial stages of the enterprise when the necessary proceedings preliminary to the execution of the proposed work are being taken with due promptness, or when the work is under way, the municipal consent should be subject to revocation at any time by the authorities—not upon the ground that the contract had not been performed, or that any condition thereof, express or implied, had been broken, but because as yet no contract whatever had been made and there was nothing but a license which might be withdrawn at pleasure. Grants like the one under consideration are not nude pacts, but rest upon obligations expressly or impliedly assumed to carry on the undertaking to which they relate. See *The Binghampton Bridge*, 3 Wall., 51, 74; *Pearsall* v. *Great Northern Railway*, 161 U. S., 646, 663, 667. They are made and received with the understanding that the recipient is protected by a contractual right from the moment the grant is accepted and during the course of performance as contemplated, as well as after that performance."

These latest decisions of this Court must decide

this case. They are clear, explicit, and decisive, in holding that a general legislative authority to exercise a special right or privilege, such as the Ohio statute here involved, is *an offer by the State* which is converted by an acceptance by some particular corporation into a binding *contract* and a *vested property right;* and that such an offer is accepted when some individual or corporation makes an investment of money and changes its position upon the faith of the offer and for the purpose of undertaking the performance of the described service, even though such individual or corporation may not have actually entered upon the performance of the service or made actual user of the rights offered. The Court, moreover, has pointed out at great length the very cogent reasons which impel the adoption of this construction of such offers. As stated in some of the opinions, an offer of this nature with respect to a system of water supply (and this applies with equal force to a system for the development of hydro-electric power), involves "the securing of sources of supply, the provision of conduits for conveying the water to the municipality and the permanent investment in the construction of reservoirs with suitable storage capacity," and it is not to be supposed that such investments would be made if the offers were subject to immediate revocation, either by legislative repeal or by the interference of other corporations, private or municipal, seeking to utilize the same subject-matter for a conflicting use. It is an actual fact, now judicially recognized by this Court, that private capital would never be invested in such undertakings as that of the plaintiff if the rights of a corporation undertaking the service were subject to revo-

cation or practical destruction by outside interference at any time before the company gets to the point of actually furnishing the service it was formed to supply. So, in the case at bar, the contention that the plaintiff acquired no property rights because it had not actually acquired title to the soil from the private owners, involves principles which, if sanctioned by this Court, would absolutely prevent any one from investing money in such an enterprise, for under such a doctrine it would be within the power of any and every city council and village board in the State to confiscate a complete system at any time prior to the moment the electric current was turned on, although the previous work had cost millions of dollars.

If the plaintiff has not already acquired a property right, *when do these creatures of the State undertaking to perform the public service bring themselves within the pale of the Constitution?* If compliance with the statutory conditions and the adoption of definite plans for the undertaking whereby they definitely locate the scene of their improvements, do not vest in them a property right and bind the State by contract not to permit its other creatures and agencies to interfere without compensation, *when is a property right acquired and when is immunity from interference secured?*

POINT V.

The plaintiff is being deprived of its property unconstitutionally.

That a diversion "of all the waters of the Cuyahoga River" at the point designated in the ordinance of the City of Akron would utterly destroy the plaintiff's rights is so obvious and apparent that it needs no argument or citation of authorities to show that such diversion would constitute a deprivation of the plaintiff's property within the meaning of the Constitution. It is unnecessary, therefore, to dwell longer upon this phase of the case.

The only subject remaining for consideration is whether upon the allegations of the bill the threatened deprivation is *without due process of law*.

Upon that subject our position is this: The only possible right or power the defendant may have, or in fact claims to have, to deprive the plaintiff of its property or to take the plaintiff's property is by virtue of its position under the State as the possessor of the right to exercise a governmental function, *i. e.*, the power of eminent domain. Consequently, if any requisite to a lawful exercise of that power by the defendant be lacking, the deprivation or taking is *perforce* without due process of law. Those requisites, it is elementary, include, (1) an authority from the sovereign to exercise the power; (2) a valid appropriation in accordance with the method prescribed by the sovereign; (3) a public use as the end and object in view; (4) payment of just compensation.

The absence of each of these requisites is shown in the points which follow.

POINT VI.

The statutes upon which the defendant bases its rights were repealed by an amendment to the Constitution of Ohio which was adopted September 3, 1912, and became effective November 15, 1912. Hence the defendant's acts are without any legal sanction or authority whatever.

This phase of the case presents for determination an important question with respect to the effect of Article XVIII of the Ohio Constitution, which was passed and submitted to the people by the Ohio Constitutional Convention of 1912 and was adopted by a vote of the people of the State on September 3, 1912. The initiative and referendum, *in both State and municipal legislation*, were among the predominate ideas which controlled that Convention, and radical changes in the existing law of the State need cause no surprise—they were intended and have been effected.

To understand the effect of the amendment in its relation to this case, we must consider, first, the statutes as they existed, and, second, the terms of the amendment—bearing in mind that if the former be *inconsistent* with the latter, then, by the express command of the people, the former are repealed.

(a) *The statutes as they existed prior to November 15, 1912.*

It will, of course, be admitted that the defendant had no authority to exercise the power of eminent domain except as it was conferred by statute. The defendant's ordinance (Amended Bill, Par. XXI) recites that it is based in part upon

the authority of House Bill No. 357 of the Ohio Legislature, passed May 17, 1911, and contained in Volume 102 of the Ohio Laws, at page 175. This statute simply releases whatever interest the State, in its proprietary capacity, might have in the waters of the Cuyahoga River; and as it was expressly admitted in argument below that it has no other effect and that "the Court may eliminate that from his mind," we spend no time in discussing it. There is no pretense that it confers any power of eminent domain. There remain, therefore, as the sole authority for the ordinance, Sections 3677 to 3697 of the Ohio General Code of 1910, which constitute the chapter relating to the appropriation of property by municipal corporations. Sections 3677, 3678 and 3679 confer and define the *power* to appropriate, and the remaining sections of the chapter regulate the *procedure* for appropriation.

The material part of Section 3677 as amended in March, 1910 (Ohio Laws, Vol. 101, pp. 15 and 16), is as follows:

> "Sec. 3677. Municipal corporations shall have special power to appropriate, enter upon and hold, real estate within their corporate limits. Such power shall be exercised for the purposes, and in the manner provided in this chapter. * * * (Here are enumerated various purposes, such as streets, parks, bridges, public halls, prisons, sewers, drains, gas, electric lighting, heating and power plants, etc.)
>
> * * * * * * *
>
> "13. For providing for a supply of water for itself and its inhabitants by the construction of wells, pumps, cisterns, aqueducts, water pipes, dams, reservoirs, reservoir sites and water works, and for the protection thereof; and to provide for a supply of water for

itself and its inhabitants, any municipal corporation may appropriate property *within or without the limits of the corporation*; and for this purpose *any* such municipal corporation may appropriate in the manner provided in this chapter, *any property or right or interest therein, theretofore acquired by any private corporation for any purpose* by appropriation proceedings or otherwise. Either party to such appropriation proceedings shall have the same right to a change of venue as is now given by law in the trial of civil actions."

The other sections relating to the power to appropriate are as follows:

"Section 3678. In the appropriation of property for any of the purposes named in the preceding section, the corporation may, when reasonably necessary, acquire property outside the limits of the corporation. No land shall be appropriated or obtained for public cemeteries within two hundred yards of a dwelling house, without the consent in writing, of the owner of the tract of land on which such dwelling house is situated.

"Section 3679. When it is deemed necessary to appropriate property, council shall pass a resolution, declaring such intent, defining the purpose of the appropriation, setting forth a pertinent description of the land, and the estate or interest therein desired to be appropriated. *For water works purposes and for the purpose of creating reservoirs to provide for a supply of water, the council may appropriate such property as it may determine to be necessary.*"

These statutes cover the entire subject of the exercise of the power of eminent domain by municipal corporations and specify in detail the purposes for which that power may be exercised.

The enormous power which they confer upon the governing body of the cities and villages of the State is scarcely appreciated by a cursory examination; but they do, in terms, actually vest in the governing body of each and every city and village in the State, no matter how small (for the term "municipal corporation" includes villages as well as cities—Sec. 3497), the absolute and unlimited power to appropriate, upon its own determination of the necessity therefor, any and all property "theretofore acquired by any private corporation for any purpose," which, of course, includes the power to take, not only any existing water supply plant, but, also, any property actually in use for *any public purpose anywhere in the State*, whether it be a telegraph or telephone line, a railroad or any other public utility. It is not surprising that such power should be limited by the people.

(b) *The Constitutional Amendment of 1912.*

By the amendment mentioned above, Article XVIII was added to the Constitution of Ohio. This article is entitled "Municipal Corporations," and deals comprehensively with that subject. The amendment was adopted by the people on September 3, 1912. As appears by the schedule annexed thereto, it took effect on November 15, 1912. By another schedule (frequently termed "Section 20," or "Schedule 20") it was provided:

> "The several amendments passed and submitted by this Convention when adopted at the election shall take effect on the first day of January, 1913, except as otherwise specifically provided by the schedule attached to any of said amendments. All laws then in

force, *not inconsistent therewith*, shall continue in force until amended or repealed; provided that all cases pending in the Courts on the first day of January, 1913, shall be heard and tried in the same manner and by the same procedure as is now authorized by law. Any provision of the amendments passed and submitted by this convention and adopted by the electors, inconsistent with, or in conflict with, any provision of the present Constitution, shall be held to prevail."

The amendment is printed in full as an appendix to this brief, but as Sections 4 and 5 are of special and controlling importance in this case we repeat those sections here:

"Section 4. Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

"Section 5. Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted

> to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of Section 8 of this article as to the submission of the question of choosing a charter commission.

(c) *Inconsistencies between the statutes and the amendment.*

The State Court has decided that, irrespective of any express declaration such as is contained in the schedule, all existing laws inconsistent with the amendment fell, or, in other words, "were repealed by implication."

> *State* v. *Cameron*, Ohio St., 106 N. E., 29, deciding the effect of the Amendments of 1912, and approving *Cass* v. *Dillon*, 2 Ohio St., 607.

The test adopted by the State Court in determining the question of consistency is: *Has the Legislature under the new Constitution the present right to enact statutes substantially like those claimed to be repealed.* This is the test applied in *State* v. *Cameron*, *supra*, and in that case the Court said, also:

> "If the statute exceeded the power conferred by the Constitution, then to the degree of the excess clearly that must fall by reason of repugnance."

Under this recognized test and, indeed, under any sound principle of statutory construction, the inconsistencies between the statutes and the amendment seem obvious and apparent.

There certainly can be no doubt that the words "public utility" as used in Section 4 of the amendment include systems for supplying municipali-

ties with water; and, therefore, in providing that municipalities may acquire, construct, own, lease, and operate within or without their corporate limits "any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants," Section 4 is clearly dealing with a subject embraced in Section 3677 of the Code. To the extent, therefore, that the statute and the amendment give power to municipalities to acquire, construct, own, and operate systems of water supply, they are "duplicates" of each other and not inconsistent or repugnant (*State* v. *Cameron, supra*). But here the consistency ends.

Under the *statute*, the necessity for or expediency of the acquisition or construction—the determination of whether the utility shall or shall not be acquired or constructed—is vested solely, exclusively, and finally in the council. Under the *amendment*, these questions are subject to a referendum to the electors of the municipality. The council can no longer appropriate property or commit the municipality to expense for this purpose by their own *fiat*.

In addition to this, Sections 6 and 10 of the Amendment provide for the appropriation of an *excess* over what is to be occupied by the "improvement" and for a sale of such excess; Section 11 authorizes the assessment of benefits to help pay for the improvement; and Section 12 authorizes bonds to be issued to an amount beyond the limit fixed by law and under provisions which may result in the city's utility being sold on foreclosure sale to a private purchaser. The statutes provide for none of these things.

The precise effect of these radical changes need

not be determined here. They are wholly inconsistent with the law as it previously existed; and the mere fact that the basic question of whether or not the utility shall be acquired at all is now subject to a referendum to the people is sufficient to preclude the idea that this defendant is authorized to proceed simply upon the ordinance of its city council, for it is obvious that the Legislature could not, under the Amendment, pass any statute which vests in that body the absolute power which is conferred by Sections 3677 to 3679 of the Code.

The fact that the ordinance in this case was passed a few days before the Amendment was adopted by the people does not affect the situation. The ordinance is fatally defective under the then existing law (see next point), but even if it were not, no appropriation proceedings had been commenced, the particular lands to be taken had not been *located*, and the city was not yet committed or obligated for the expenditures necessary to be made in order to carry the ordinance into effect. Nor had these things been done when the Amendment took effect on November 15, 1912. Under these circumstances, the ordinance could not stand in any better position than the statute under which it was enacted—the statute falling, the ordinance fell with it. The plain intent of the Amendment being to make the council's decision to acquire a public utility subject to a vote of the people—and the people being so anxious to bring about this condition so speedily that they made this amendment effective a month and a half earlier than the other amendments adopted at the same time—is it not absurd to suppose that the council may

incur *after November 15, 1912*, the enormous debt necessary to acquire this particular utility simply because it had previously resolved that it would make the acquisition? And if the council have no authority to pay for the property to be acquired, how can it have the authority to acquire the property?

The only reasonable construction of the Amendment is that from and after November 15, 1912, the City of Akron had no power whatever to acquire property by an exercise of the power of eminent domain except in accordance with the terms of the Amendment; that those terms include, as a condition precedent, that the electors of the city shall have a period of thirty days during which to consider whether they will accept the determination of the council to make the acquisition or submit the matter to a vote of the electors themselves, and that if within those thirty days ten per centum of the electors demand a submission of the matter to the electors then no such acquisition can be made unless by a majority vote. The plaintiff's property not having been acquired by the city before that date and no proceeding for such acquisition having been instituted, it follows that in order to acquire that property lawfully the city must comply with those terms. And those terms not having been complied with, it follows that the city is without authority to make the acquisition; and its taking of the plaintiff's property is unlawful—without due process of law.

POINT VII.

The defendant's ordinance does not constitute a valid appropriation of the property it proposes to take.

If, however, we be wrong in the contention that the defendant no longer has the authority to proceed under its ordinance, then the same authority which confers upon the defendant the *power* to appropriate requires that the resolution declaring the intent to appropriate shall set forth "a *pertinent description* of the land, and the estate or interest therein desired to be appropriated" (Ohio Code, Section 3679); that written notice of the resolution shall be given, either personally or by publication, "to the owner, person in possession thereof, or having an interest of record in, every piece of property sought to be appropriated, or to his authorized agent" (*Idem*, Section 3680); and that, upon the passage of the ordinance directing the appropriation to proceed, the City Solicitor shall make an application to the Court, "which application shall *describe as correctly as possible* the land to be appropriated, the interest or estate therein to be taken, the object proposed, and the name of the owner of each lot or parcel thereof" (*Idem.*, Section 3681).

It is quite apparent from Paragraph XXI of the amended bill that the defendant here has wholly failed to comply with these conditions. What it has described and purported to appropriate is:

> "*All the waters of the Cuyahoga River at and above a line* heretofore fixed as the axis of a proposed dam to be built by said City, in the Township of Franklin, County of Portage, and

> State aforesaid; said line of appropriation being approximately twelve hundred (1200) feet northeast from the point where the Cleveland & Pittsburgh Division of the Pennsylvania Railroad now crosses said Cuyahoga River, and being shown upon a plan dated June, 1911, prepared by Frank A. Barbour and Edward G. Bradbury and bearing the inscription 'City of Akron Improvement of Water Supply Plan Showing Development of Cuyahoga River, Sheet 9;' and also *all the waters of all the tributaries of said Cuyahoga River, above said line* of appropriation, and *all the waters which may flow into and from Cuyahoga River and the tributaries thereof above said line*, for the purpose of diverting the same for the purpose aforesaid, at or near said line, and not elsewhere."

Not only is there a failure to set forth a "pertinent description" or "describe as correctly as possible" the land to be appropriated, but it is also apparent that there is an inherent and fatal defect in that the ordinance assumes to appropriate what is *not* taken and makes no appropriation of what *is* taken. By diverting the water at its dam, the defendant does not "take" the waters above the dam—what it takes is the plaintiff's franchise and the property of every owner below the dam. The City's proceedings describe one thing, the dam takes another. The right of a riparian owner to have the stream flow to and from his premises in the quantity, quality and manner in which it is accustomed to flow by nature constitutes property under the decisions in Ohio.

Mansfield v. *Balliet*, 65 Ohio St., 451.

And it is this property of the lower riparian owners which the City actually appropriates by building a dam at the place specified. There is no description, pertinent, correct, or otherwise, of this

property; and it is manifest that the City's proceedings do not constitute a valid appropriation in accordance with the method prescribed by the sovereign under which it purports to act.

There is little, if any, difference between the "specific description" which the plaintiff is required to make of property it desires to appropriate (Ohio Code, Section 11042) and the "pertinent description" which the defendant is required to make; and by contending here that by adopting its specific descriptions and actually instituting condemnation proceedings thereon the plaintiff has not acquired a property right the defendant necessarily admits that its own attempted appropriation under its resolution and ordinance give it no rights whatever.

POINT VIII.

The defendant's attempted appropriation is not valid for the further reason that it constitutes an unnecessary and unreasonable interference with property already devoted to a public use and is not in good faith but collusive and fraudulent.

In addition to the statutes mentioned above, there is another requisite to a valid appropriation in Ohio:

> "It is the settled policy of this State to protect from unnecessary interference or destruction a public use already acquired in property, and we do not think that the Legislature * * * intended to relax this rule or abandon this wise public policy."
>
> *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 88 Ohio St., 283, 295, 102 N. E., 951 (decided June, 1913).

This statement was made by the Supreme Court of Ohio in holding that a statute, which provided that "if it be necessary in the judgment of the Board of Directors of any domestic or foreign corporation owning or operating a railroad wholly or partly within the State of Ohio to use and occupy for an elevated track any portion of any public ground * * * such company may appropriate an easement over so much of such ground as may be necessary for such purpose," did not give the railroad company absolute, uncontrolled and unreviewable discretion to determine the necessity for appropriating property already devoted to a public use. And in the same case the Court said that *if the statute were to be construed as giving such discretion it would violate Section 16 of Article I of the Constitution of the State.*

The Supreme Court of the State has further held that, inasmuch as the statute with reference to appropriation of property by municipal corporations does not provide for a determination in the appropriation proceeding of the question whether the appropriation would unnecessarily interfere with property already devoted to a public use, the company whose property is about to be unnecessarily interfered with may enjoin the municipality from making the appropriation.

> *P. C. C. & St. Louis Ry. Co.* v. *Greenville*, 69 Ohio St., 487.

From these decisions of the highest State Court it follows that, even assuming Sections 3677-3679 of the Ohio Code are still in force, yet if the proposed taking by the defendant "of all the waters of the Cuyahoga River" be an unreasonable and unnecessary interference with the public use

which the plaintiff has already acquired therein, then the defendant's appropriation is not a valid appropriation in accordance with the method prescribed by the sovereignty under which it acts and hence its taking is not by due process of law.

The allegations of the bill are amply sufficient to present this issue (Amended Bill, Pars. XXIX, XXX, XXXI, XXXII, XXXIII), and the dismissal was therefore erroneous, for the plaintiff is clearly entitled to an opportunity to prove by evidence what a useless, wanton, and arbitrary thing—what a gross abuse of power and unnecessary and unreasonable interference with existing rights—this whole proceeding of the defendant really is.

(See *Suburban Rapid Transit Co.* v. *Mayor, etc., supra*, and other cases cited in Point III as showing that the river has been already devoted to a public use by the plaintiff, though its plant has not been actually constructed.)

Of course we cannot demonstrate upon this record that "the action of defendant in appropriating plaintiff's property herein and proposing to abandon its present source of water supply is in bad faith and fraud and is done pursuant to a conspiracy" because the defendant has never had an opportunity to present proof of these and other similar facts alleged in the bill. We can, however, point out that the report made to the City by Messrs. Barbour and Bradbury expressly stated several different sources of supply which were available to the defendant and based its recommendation of the Cuyahoga River upon the alleged fact that the damages for water rights on that river would amount to only $450,000 (although they have already exceeded $900,000), and that by

reason of the quality of the water of that river there would be *a great saving in soap* (Report, pp. 65, 66); and we believe it is not exceeding the proprieties of a brief to inform the Court that the Mayor of the City of Akron, in seeking re-election as against the candidacy of the gentleman who was primarily responsible for the selection of the Cuyahoga, publicly stated:

> "Mr. Gauthier's candidacy was launched at a function at the Country Club. While Service Director he located the source of the city's water supply on the Cuyahoga River-Kent site on the north at an enormous expense to the city and irrevocably committed subsequent administrations to that site when the natural and economical source for the city was the Tuscarawas water shed on the south. This left the Tuscarawas shed supply unmolested to the rubber companies although there would have been enough for both them and the city. Mr. Gauthier now holds and has held a high salaried position with The Goodrich Rubber Company since he left office as Service Director under the Sawyer-Benner-Gauthier administration. Draw your own conclusions."

And the Mayor *was* re-elected.

POINT IX.

The defendant's proposed diversion of "all the waters of the Cuyahoga River" is not for a public use.

We, of course, do not dispute the general proposition that a taking of water for the purpose of municipal supply is a taking for public use. Our contention here is that as a matter of fact the

water which the defendant proposes to take will not be actually used for that purpose.

The bill shows that the capacity of the Cuyahoga River above the point described in the defendant's ordinance is 200,000,000 gallons per day; that the population of the City of Akron is now approximately 86,000 persons, and within the next thirty-five years, *i. e.*, to 1950, it will not exceed 260,000 persons, and that the average daily consumption by the City during that period will at no time exceed 26,000,000 gallons per day (Amended Bill, Par. XXXII). It is proper to state in this connection that the figures set forth in the bill on this point are *taken directly from the report made by the City's engineers mentioned in the ordinance under which the City is acting.* It is also a recognized fact, known to all authorities upon municipal water supplies, that an allowance of 100 gallons per day per capita is ample for all needs. It is thus apparent that upon a liberal estimate, *and wholly aside from the allegation made in the bill and sustainable by the report of the city's own engineers that the city actually does not need* ANY *water from this river for twenty years to come*, the City of Akron will be unable, for at least thirty-five years to come, to use more than slightly over ten per cent. of the water which it now proposes to take. The question of what is to be done with the excess (at least 175,000,000 gallons per day) cannot be answered upon this record, but obviously it cannot be for the purpose of supplying the City and its inhabitants with water, and for the City of Akron to use it for any other purpose would be for a private and not for a public use. This, of course, cannot be done, for private property cannot be taken for a private use.

Upon this ground alone, therefore, the plaintiff sets up an unconstitutional invasion of its rights, and were there no other question in the case the allegations that the proposed taking is not for a public use would be sufficient to give jurisdiction.

POINT X.

The defendant has not paid and does not intend, and is not able to pay just compensation to the plaintiff for the property taken.

Finally, even if the defendant have authority from the sovereign to exercise the power of eminent domain and has made a valid appropriation for a public use in accordance with the method prescribed, yet the essential element of the payment of just compensation is lacking.

The Constitution and statutes of Ohio require that compensation be paid *first*, and the compensation has already become due.

> *Ohio Constitution*, Article I, Section 19.
> *Cuyahoga River Power Co.* v. *Akron*, 210 Fed., 524.
> *Lewis, Eminent Domain*, Section 676.

Under the defendant's ordinance it was, furthermore, the duty of the solicitor of the city to make application to the Court to condemn the plaintiff's property. This he has failed and refused to do, and the defendant states that it does not intend to bring any such proceedings against the plaintiff (Amended Bill, Paragraphs XXI, XXII).

The defendant is, furthermore, financially un-

able to pay just compensation (*Id.*, Par. XXXIII). And the defendant stands before this Court contending that it is under no obligation to make just compensation.

Under these circumstances, it is obvious that the plaintiff has not received, and, unless it prevail in this suit, it will not receive, any compensation for the property of which it is being deprived.

Conclusion.

We cannot emphasize too strongly the defendant's selfish, unlawful and ruthless disregard of the rights and interests, not only of this plaintiff, but, also, of all that section of the State of Ohio which the plaintiff will improve, benefit, and serve. If the defendant were acting fairly and justly and with an honest desire and purpose to provide itself with such an amount of water as it really and reasonably needs, its proceedings might be regarded with more favor. But even then it could not justify its attempt to confiscate and destroy the plaintiff without the payment of just compensation. Surely in this Court the defendant must be required to point to some legal sanction for its acts and confine its exercise of power to a reasonable satisfaction of its reasonable needs, and cannot be permitted, in violation of the laws of its sovereignty, to work an unreasonable, unnecessary, injury to others. And above all, it cannot take property for *a private use*. That is the situation here. The bill clearly dis-

closes an unconstitutional invasion of the plaintiff's rights, and we appeal to this Court for protection with absolute confidence that it will be accorded.

Respectfully submitted,

CHARLES A. COLLIN,
Counsel for Appellant.

Appendix I.

[From 5 Ohio Nisi Prius Reports (N. S.), 204.]

EMINENT DOMAIN FOR THE PURPOSE OF CREATING WATER POWER.

(Probate Court of Clermont County.)

THE LITTLE MIAMI LIGHT, HEAT & POWER COMPANY

v.

JOHN T. WHITE *et al.**

Decided December 19, 1906.

Legislative Authority to Confer the Right of Eminent Domain—May be Granted to a Water Power Company—Where the Stream is not Navigable—Courts Will Not Interfere, Unless—Constitutionality of Section 3878.

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*Affirmed by the common pleas, February 26, 1906, without report. Affirmed by the Circuit Court April 10, 1907, when the above opinion was read, approved and adopted by Swing, J., Giffin and Smith, JJ., concurring.

Note.—Judgment of Circuit Court affirmed by Supreme Court in 1908 as stated in brief.

1. Section 3878, Revised Statutes, as amended April 23, 1904, is a proper exercise of the constitutional power of the General Assembly, and not an abuse thereof.

2. The General Assembly possesses the constitutional power to confer upon a corporation the right to appropriate land for the erection of dams in non-navigable streams for the purpose of raising a head of water as power for the generation of electricity.

3. The judiciary will not interfere with the exercise of legislative authority in conferring the power of eminent domain, unless there appears to be a gross and manifest abuse of such authority.

PAXTON, J.:

The plaintiff corporation filed its petition in this Court for the appropriation of a tract of land consisting of about eight acres in Miami township, in this county, on the waters of the Little Miami River, the petition being in the usual form and containing the usual allegations of petitions for the appropriation of real estate. The defendants, John T. White *et al.*, having been duly served with summons, the cause came on for hearing upon the preliminary questions on December 19th, 1906. Afterwards a jury was called and empaneled, testimony of witnesses heard and a verdict for the defendants, John T. White *et al.* returned by the jury. A motion for a new trial was made by defendants and overruled, and judgment rendered on the verdict.

The matters presented to this Court for determination are those involved in the following preliminary questions, viz.:

1. The corporate existence; 2, inability to agree with the owner; 3, the necessity for the appropriation; 4, the right to make the appropriation.

The plaintiff offered satisfactory and conclusive evidence to prove the facts involved in the preliminary questions, the defendants offering no evidence, but contending that the objects and purposes of the plaintiff corporation, as stated in its articles of incorporation, are such that it cannot properly be vested with the right of eminent domain, and that the land sought to be appropriated is not necessary for the purposes of the company.

The plaintiff corporation was incorporated on the 23rd day of July, 1906, under the general law of the State of Ohio. Following is a statement of the purposes of said company as the same are expressed in its articles of incorporation, viz.:

> "Third. Said corporation is formed for the purpose of acquiring, erecting, building, maintaining and operating dams in the Little Miami River, in the State of Ohio, to raise and maintain a head of water; of constructing and maintaining canals, locks and raceways to regulate and carry said head of water to any plant or power house where electricity is to be generated; of erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity; of acquiring, producing, manufacturing, generating and selling electricity for light, heat, power and other purposes; of acquiring, holding and selling franchises and privileges to supply the same to municipal corporations; of acquiring by condemnation, lease, purchase or otherwise, and of possessing, holding and selling such real estate and personal property as may be necessary or convenient for the proper conduct of said business, and of doing any and all other things necessary and incident to any

of said purposes. Said company's improvements are to begin at the confluence of the Ohio and the Little Miami Rivers, in Hamilton County, Ohio, and extend along the said Little Miami River and through the Counties of Hamilton, Clermont and Warren, to a point in said river opposite the Village of Morrow in said last named county."

Plaintiff claims the right of eminent domain under the provisions of Section 3878, Statutes of Ohio, as amended April 23, 1904 (97 O. L., 300). By reference to that section it appears that the purposes for which the corporation is created bring it clearly within the meaning of that section, and give to it the right to appropriate private property. But it is claimed that the purposes and objects of the plaintiff corporation are such as to bring it within the limitation of the constitutional inhibition; that the use for which it is sought to appropriate the land is a private and not a public use (Section 19, Article I, and Section 5, Article XIII of the Constitution of Ohio).

The question, therefore, is: Had the Legislature the power to confer upon the corporation the right to condemn property for the purposes expressed in its articles of incorporation?

It has been held that the sections of the Constitution, above referred to, do not confer the power of eminent domain, but simply designate means for, and limitations upon, its exercise. This is in accordance with the definition of eminent domain that it is "a right inherent in all sovereignties, and, therefore, would exist without any constitutional recognition;" that it antedates Constitutions, which are only declaratory of previously existing universal law, and is not conferred, but is limited by them; that the title in fee of all

property is held subject to the public user, of the necessity or expediency of which use the Government itself must judge. And it is on the ground of the general public good that the Legislature grants to companies or bodies the compulsory power of taking the property of individuals.

The question whether or not a contemplated use is a public use, or for the public welfare, within the meaning of the Constitution, is one for the Legislature.

> Giesy *v.* C. W. & Z. Railroad Co., 4 Ohio State, 326.

In deciding the case last referred to, Justice Ranney makes the following statement:

> "In saying that the exercise of this power properly belongs to the General Assembly and not to the judiciary, I do not intend to express a doubt that in cases where its limits have been exceeded, or its spirit and purpose abused, a judicial remedy may not be afforded."

The plain and obvious meaning of which is, that unless there should be a gross and manifest abuse of the power by the Legislature, the judiciary should not assume to determine it.

In this case the Legislature has declared that the use is a public one, and the Courts should hold it to be such, unless it manifestly has no tendency to promote such use (12 Cush., Mass., 475). There is a presumption in favor of the public character of the use arising from its having been authorized by the Legislature (12 Cush., Mass., 475). No general definition of what degree of public good will meet the constitutional requirement for a "public use" can be framed, as it is in every case a question of local policy.

Under certain general principles, however, upon which the decisions are based, the term "public use" is usually intended to cover a use affecting the public in general, or any number thereof, as distinguished from particular individuals. If the use is in fact a public one, its character is not changed by the fact that the control of the property sought to be taken will be vested in private persons, or private corporations, actuated solely by motives of private gain, and that private purposes will be thereby incidentally served.

On this subject the Supreme Court of Ohio has said, in Giesy *v.* C. W. & Z. Railroad Co., 4 Ohio State, 326:

> "It rests upon the public necessity—subordinates the rights of one to the welfare of all—and is just as broad as that necessity, and no broader. If the wants of the public are attained by the acquisition of an *easement*, nothing more can be taken; if the whole interest is required, the whole may be appropriated. Whether this power is derived from an implied condition in every grant, by which property is held under the Government, and whether where no constitutional restraints exist, it may be exercised without making compensation, are rather questions for ingenious speculation, than of practical importance."

There are numerous authorities sustaining the constitutionality of acts authorizing the flowage of water and the erection of dams in streams for the purpose of furnishing power to run mills of various kinds, but by reason of the comparatively recent date of the employment of electricity as power for general purposes, decisions are not to be found which are directly in point in the present case.

The non-navigable character of the Little Miami

River, between the points named in plaintiff's articles of incorporation, is well established, thus taking out of the question the rights of the public in regard thereto. If we compare the purposes of this plaintiff with the purposes and uses of the mills above referred to and their respective relations to the public, it certainly will appear that the importance of plaintiff's proposed use of its powers is of vastly greater benefit to the public. The successful and economical generation of electricity by water power has long passed the experimental stage and its many uses for public and private purposes may not now be enumerated.

On the authorities, and for the reasons above given, judgment is rendered in favor of the plaintiff on all the preliminary questions in this case.

Appendix II.

(Amendment to Ohio Constitution.)

ARTICLE XVIII.

MUNICIPAL CORPORATIONS.

Classification.

Section 1. Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law. (Adopted September 3, 1912.)

General and Additional Laws.

Section 2. General laws shall be passed to provide for the incorporation and government of mu-

nicipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law. (Adopted September 3, 1912.)

Powers.

Section 3. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. (Adopted September 3, 1912.)

Public Utilities.

Section 4. Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility, the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility. (Adopted September 3, 1912.)

Public Utilities.

Section 5. Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty

days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of Section 8 of this article as to the submission of the question of choosing a charter commission. (Adopted September 3, 1912.)

Public Utilities.

Section 6. Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per centum of the total service or product supplied by such utility within the municipality. (Adopted September 3, 1912.)

Home Rule.

Section 7. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of Section 3 of this article, exercise thereunder all powers of local self-government. (Adopted September 3, 1912.)

Home Rule.

Section 8. The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the sub-

mission to the electors, of the question, "Shall a commission be chosen to frame a charter?" The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election, if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. Not less than thirty days prior to such election the Clerk of the municipality shall mail a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. If such proposed charter is approved by a majority of the electors voting thereon, it shall become the charter of such municipality at the time fixed therein. (Adopted September 3, 1912.)

Home Rule.

Section 9. Amendments to any charter framed and adopted as herein provided may be submitted

to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and, upon petitions signed by ten per centum of the electors of the municipality setting forth any such proposed amendment, shall be submitted by such legislative authority. The submission of proposed amendments to the electors shall be governed by the requirements of Section 8 as to the submission of the question of choosing a charter commission; and copies of proposed amendments shall be mailed to the electors as hereinbefore provided for copies of a proposed charter. If any such amendment is approved by a majority of the electors voting thereon, it shall become a part of the charter of the municipality. A copy of said charter or any amendment thereto shall be certified to the Secretary of State, within thirty days after adoption by a referendum vote. (Adopted September 3, 1912.)

Appropriation in Excess of Public Use.

Section 10. A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law. (Adopted September 3, 1912.)

Assessments for Cost of Appropriating Property.

Section 11. Any municipality appropriating private property for a public improvement may provide money therefor in part by assessments upon benefited property not in excess of the special benefits conferred upon such property by the improvements. Said assessments, however, upon all the abutting, adjacent, and other property in the district benefited shall in no case be levied for more than fifty per centum of the cost of such appropriation. (Adopted September 3, 1912.)

Bonds for Public Utilities.

Section 12. Any municipality which acquires, constructs or extends any public utility and desires to raise money for such purposes may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such municipality but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure. (Adopted September 3, 1912.)

Taxation, Debts, Reports and Accounts.

Section 13. Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided

by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities. (Adopted September 3, 1912.)

Elections.

Section 14. All elections and submissions of questions provided for in this article shall be conducted by the election of authorities prescribed by general law. The percentage of electors required to sign any petition provided for herein shall be based upon the total vote cast at the last preceding general municipal election. (Adopted September 3, 1912.)

SCHEDULE.

If the foregoing amendment to the constitution be adopted by the electors and become a part of the constitution, it shall take effect November 15, 1912. (Adopted September 3, 1912.)

10

Supreme Court of the United States.

October Term, 1915.

No. 465.

THE CUYAHOGA RIVER POWER COMPANY,
Appellant,

v.

THE CITY OF AKRON,
Appellee.

Appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division.

Brief for the Appellee.

Andrew C. Gotwals & Son, Law Printers, Boston, Mass.

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LIST OF CASES CITED.

LIST OF CONSTITUTIONS QUOTED.

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Brief for the Appellee.

STATEMENT OF THE CASE.

This cause comes before this Court on an appeal, by the plaintiff below, from a decree entered in the District Court of the United States for the Northern District of Ohio, Eastern Division, dismissing the plaintiff's bill of complaint on the ground that that Court had no jurisdiction of the cause.

The appellant, on July 14, 1913, filed its original bill of complaint (Record, p. 1). To this bill the appellee filed its motion to dismiss (Record, p. 30) and, after hearing, a decision was rendered thereon by Mr. Justice DAY, sustaining the motion to dismiss and directing that the bill be dismissed (Record, p. 31). Thereafter, by leave of the District Court, the appellant filed its first

amended bill of complaint (Record, p. 36), the appellee filed a motion to dismiss the amended bill (Record, p. 59), and, after hearing, a decision upon this matter was rendered by Mr. Justice KILLITS, directing that the amended bill be dismissed (Record, p. 60). On July 7, 1914, a decree was entered dismissing the bill (Record, p. 61), and from this decree the appellant appeals, and brings this cause before this Court with a certificate that the jurisdictional question was involved.

The amended bill appears to be in substitution for the original bill of complaint, and it is therefore necessary to consider only the allegations of the amended bill. There is no allegation of diversity of citizenship, the aid of the District Court being invoked upon the ground that the suit arises under the Constitution and laws of the United States.

The appellant alleges its incorporation under the laws of Ohio in 1908 (par. III, Record, p. 37), its purposes as amended in February, 1912 (par. IV, Record, p. 37), and various acts and proceedings which it has done or instituted. These purposes are, in brief, to develop hydro-electric power on the Cuyahoga River and other waters of Ohio (par. IV, Record, p. 37); and the acts and proceedings are the procuring and adoption of plans and surveys, the passing of certain votes, the determination to proceed with the construction of dams and reservoirs, and the adoption of descriptions and development programs (pars. VI–X, Record, p. 38).

It is also alleged that the appellant procured plans and surveys in 1908, at great cost and expense (par. VI, Record, p. 38), and has procured plans for the distribution of its product after the completion of its proposed power plants. It is not alleged that any riparian lands

or waters or water rights have been acquired or are owned by the appellant, except that, as a conclusion of law, it is stated (par. XII, Record, p. 41) that by reason of the incorporation of the appellant, the expense incurred in the procuring of plans and surveys, and by reason of the votes of the directors of the appellant, the appellant became substituted to all of the rights of the riparian owners of the Cuyahoga River "and became, in truth and in fact, the riparian owner on such river, absolutely as to third parties, and conditionally as to the holders of title," and also, for the same reasons, that the appellant became substituted to all the rights of the state of Ohio on the Cuyahoga River, "for its charter purposes and became in truth and in fact the paramount riparian owner on such river for such charter purposes absolutely as to third parties and conditionally as to the holders of title," and that such paramount ownership is an equitable title to the parcels of property necessary for the construction of its plants (par. XII, Record, p. 41). It is alleged that certain proceedings for the appropriation of land have been instituted in the Courts of Ohio, the earliest having been commenced in 1911. In none of these has the appropriation been completed (par. XIII, Record, p. 42). The bill then sets forth certain statutes of the state of Ohio (par. XIX, Record, p. 46), and the passage of a certain resolution and a certain ordinance by the council of the appellee, to appropriate waters of the Cuyahoga River for purposes of a public water supply for the appellee and its inhabitants (par. XXI, Record, p. 48). The effect of these statutes and ordinances, is, it is alleged, to impair the obligation of contracts, to take property without due process of law, and to deny the equal protection of the law

(par. XXXVI, Record, p. 56). It is also alleged that these statutes and ordinances, under color of which the appellee proceeded, are unconstitutional under the Ohio constitution (par. XIX, Record, p. 46), and, further, that they have been repealed by subsequent legislation in Ohio, and by amendment to the Ohio constitution (par. XX, Record, p. 48). The appellee is alleged not to be a riparian proprietor on the Cuyahoga River (par. XXVIII, Record, p. 52), not to need the waters of that river, and by its act of appropriation, made, proposed, and threatened, the appellant will suffer irreparable damage (par. XXXIV, Record, p. 56).

The appellee's motion to dismiss in various forms denies the jurisdiction of the District Court (Record, p. 59, and the appellant's assignment of errors, so far at least as they may now be considered, is an assertion in various forms that the District Court erred in that denial (Record, p. 63). Since this cause comes before this Court solely upon the question of jurisdiction, it is unnecessary to consider other questions raised by the assignment of errors.

ARGUMENT.

I.

The Constitutional and Statutory Foundation of the Jurisdiction of the District Court.

The jurisdiction of the District Court is founded on article III, sec. 2, of the United States Constitution, which provides that —

> "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States . . ." etc.

And upon the Judiciary Act of March 3, 1911, which provides that:

> "Sec. 24. The District Courts shall have original jurisdiction as follows:
>
> . . . . . .
>
> "*Fourteenth:* Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

II.

The Allegations of the Bill in Support of the Jurisdiction.

The bill of complaint is the sole source to which the Court may look for jurisdictional allegations.

> *Memphis* v. *Cumberland Tel. Co.*, 218 U.S. 624.
>
> *Arkansas* v. *Kansas & T. Coal Co.*, 183 U.S. 185, 188.
>
> *Bienville Water Supply District* v. *Mobile*, 175 U.S. 109.

Only those allegations which make up the plaintiff's case, and which are not mere anticipations of defense to be offered by the defendant, may be looked to.

> *Florida C. & P. R. Co.* v. *Bell*, 176 U.S. 321.

Metcalf v. *Watertown*, 128 U.S. 586.
Tennessee v. *Union & Planters Bank*, 152 U.S. 454.

The several alleged causes of complaint with reference to laws and constitutions are:

1. The defendant has no right to acquire property by reason of section 11,300 of the Ohio General Code (par. XIII, Record, p. 43).

2. House bill No. 357 of Ohio, purporting to give the defendant certain rights in Cuyahoga River, is unconstitutional under Ohio constitution (par. XIX, Record, p. 46), and was repealed by the 1912 amendment to the Ohio constitution (par. XX, Record, p. 47).

3. Section 3677 of the Ohio General Code, under which the defendant purported to act, was repealed by the 1912 amendment to the Ohio constitution (par. XX, Record, p. 47).

4. Section 3679 of the Ohio General Code, under which the defendant purported to act, was repealed by section 3678 of the Ohio General Code, as amended May 9, 1913, and also repealed by said 1912 amendment to Ohio constitution, and further that said section 3679 is unconstitutional under Ohio constitution, art. I, sec. 16, and art. II, sec. 28 (par. XIX, Record, p. 47; par. XX, Record, p. 48).

5. The defendant, by acting in violation of section 3681 of the Ohio General Code, is thereby acting without due process of law and in violation of Amendment XIV of the United States Constitution (par. XXII, Record, p. 50).

6. The ordinance No. 3396, under which the defendant purports to act, is null and void, and that the

defendant is without valid statutory authority to appropriate property for domestic water supply (par. XXI, Record, p. 50).

7. Sections 3677 and 3679 of Ohio General Code, House bill No. 357, and resolution No. 3241 and ordinance No. 3396 of the defendant, are in violation of article I, sec. 10, of the United States Constitution, guaranteeing to the plaintiff that no state shall pass any law impairing the obligation of contracts (par. XXVI, Record, p. 51).

8. The defendant has violated the Fourteenth Amendment of the United States Constitution, in that it has taken the property of the plaintiff without due process of law and denies to the plaintiff the equal protection of the law, since, under color of said statutes, resolution, and ordinance, and by the construction of said dam and reservoir, the defendant has seized upon and appropriated, without compensation, the property and franchises of the plaintiff (par. XXVI, Record, p. 51).

9. That, in contravention of rights guaranteed to the plaintiff by the United States Constitution, art. I, sec. 10, and the Fourteenth Amendment thereof, the defendant pretends, under said statutes, resolution, and ordinance, to take all the property of the plaintiff, upon its own determination of the necessity therefor, and without a judicial hearing or determination as to said necessity, all of which impairs the obligation of contract, deprives the plaintiff of equal protection of the laws, and takes its property without due process of law (par. XXVI, Record, p. 51).

10. That, pursuant to resolution No. 3241 and ordinance No. 3396 and House bill No. 357, by the construction of the dam and reservoir, the defendant has taken

for some other than a public use over 180,000,000 gallons of water per day, which has been devoted to a prior and paramount public use by the plaintiff, such taking being in violation of the fundamental principle of free government — that no private property shall be taken under power of eminent domain except for a public use, and that property which has been devoted to a public use shall not be taken for an inferior or private use, and also in violation of Ohio constitution, art. I, sec. 19, that private property shall ever remain inviolate, but subservient to the public welfare (par. XXXII, Record, p. 55).

11. That the defendant has no authority or power under Ohio statutes to compensate the plaintiff, inasmuch as no fund can be secured for the same without special and additional legislation (par. XXXII, Record, p. 55).

12. That each and all of the acts of the defendant set forth in the bill of complaint are in violation of the rights of the plaintiff under the United States Constitution, art. I, sec. 10, and the Fourteenth Amendment of said Constitution (par. XXVI, Record, p. 52).

The question is, therefore, wherein any of these twelve jurisdictional allegations sets forth a case in equity arising under the Constitution of the United States.

III.

The Bill Fails to Show the Invasion of "Any Right, Privilege or Immunity Secured by the Constitution of the United States" to the Plaintiff.

The rights and privileges upon which the plaintiff places reliance are based upon the incorporation and

organization of the plaintiff and the various proceedings alleged.

1. THE INCORPORATION AND ORGANIZATION OF THE PLAINTIFF UNDER OHIO LAWS GAVE THE PLAINTIFF NO SUCH RIGHT, PRIVILEGE, OR IMMUNITY.

The bill alleges the incorporation of the plaintiff in 1908. What powers were then granted to the plaintiff the bill does not disclose. What the purposes of the plaintiff were from 1908 to 1912 (when its charter was amended so as to give it the powers set forth in paragraph IV, p. 37), during which years all the alleged acts were alleged to have been done by the plaintiff, the doing of which acts created certain rights, is not disclosed by the bill. Paragraph IV of the bill in substance alleges the plaintiff to be a hydro-electric company.

Such incorporation and organization do not constitute a contract under the Ohio law.

> *Toledo Bank* v. *Bond*, 1 Ohio St. 622.
> *Exchange Bank* v. *Hines*, 3 Ohio St. 1.

And this conception of Ohio corporations is recognized by the United States Supreme Court in its interpretation of the Ohio constitution.

> *Hamilton Gas Light & Coke Co.* v. *Hamilton City*, 146 U.S. 258.

The Ohio constitution provides:

> Art. I, sec. 2:
>
> . . . No special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

Art. XIII, sec. 1:

The General Assembly shall pass no special Act, conferring corporate powers.

Art. XIII, sec. 2:

Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed . . .

The bill sets forth the organization of the plaintiff under the general laws of Ohio. But, irrespective of the Ohio constitutional limitations, the general principle is established that mere incorporation and organization, without the acquisition of other rights, is insufficient to give the Court jurisdiction.

Ramapo Water Co. v. *City of New York*, 236 U.S. 579.

Underground R.R. v. *New York*, 193 U.S. 416.

Bienville Water Supply Dist. v. *Mobile*, 186 U.S. 212.

Adirondack Ry. Co. v. *New York*, 176 U.S. 335.

Bauman v. *Ross*, 167 U.S. 548.

But if any such rights were acquired, they were taken subject to all subsequent legislation, and especially to general legislation existing at the date of incorporation.

Lehigh Water Co. v. *Easton*, 121 U.S. 388.

Charles River Bridge v. *Warren Bridge*, 11 Peters, 420.

The Ohio constitutional reservation of amendment,

alteration, and repeal is to be read into the charter of corporations organized under general laws, whether the reservation is expressed in the charter or not —

Hamilton Gas Light & Coke Co. v. *Hamilton, supra* —

and it is so treated by the Ohio Courts —

State v. *Toledo*, 48 Ohio St. 112;
Cleveland v. *Cleveland Elec. R. Co.*, 3 Ohio Dec. 92.

The rule has been specifically applied to municipal water-takings, as affecting water-power companies. No contract right is thus impaired.

St. Anthony Falls Water Power Co. v. *Water Com. St. Paul*, 168 U.S. 349.

The plaintiff is a private hydro-electric corporation, organized under general laws. These laws provide for the formation of such corporations, but make no direct or definite provision as to any specific locality in which they are to operate. There is no requirement that, having been formed, they shall perform any public service whatever. They are free to carry out the plans of its officers, or not to carry them out, as they see fit. The incorporators, to give a necessary definiteness to its purposes for indicating what shall be *intra vires* and *ultra vires*, recite in general language where the corporation is to conduct its operations, but these purposes may be enlarged or diminished or wholly unperformed. At this stage of its existence the corporation unquestionably has certain rights. It has the right to be a corporation and, except so far as it may be limited by

statutory and constitutional limitations and the rights of other parties, it has the right to proceed or not as it sees fit, by appropriation and otherwise, with the accomplishment of the purposes which it has itself declared. It is obvious that a corporation formed in this manner differs from a municipal corporation or a corporation which cannot refuse to carry out the purposes of its formation. If the plaintiff were by its incorporation, or by virtue of exclusive franchises given to it, bound to carry out its scheme of development as it has set forth, it might perhaps be argued that it had a right commensurate with its duty; but there is no such obligation here. This is precisely the reasoning of the Court in *Suburban Rapid Transit Co.* v. *New York City*, 128 N.Y. 510, where the distinction between corporations under general laws and corporations which cannot change their location, as determined by some external public board, is emphasized. It is obvious that the plaintiff has never become responsible to the state or to the public for the carrying out of its purposes, nor acquired property or other rights which are here involved. The numerous cases cited by the plaintiff as to the protection of charter rights and of franchises are therefore wholly inapplicable. Were the position taken by the plaintiff sound — that the plaintiff's incorporation and organization and such franchises as it thereby acquired are sufficient to give it a standing in this Court upon this question — the cases of *Adirondack R.R.* v. *New York State*, *Ramapo Water Co.* v. *New York City*, and *Underground R.R.* v. *New York City* would be wholly wrong, since in these cases there had been a charter granted and a complete organization effected.

2. THE VARIOUS PROCEEDINGS OF THE PLAINTIFF ARE INSUFFICIENT.

The plaintiff contends that it has acquired property rights by reason of various proceedings. These proceedings are recited at length in the bill, but, summarized, fall into two classes: first, the adoption of plans and programs, surveys, etc., and, second, the institution of certain proceedings preliminary to the appropriation of property rights.

a. The adoption of plans, the examination of development projects, the making of surveys, and the other preliminary work set forth in the bill, however expensive, involve the plaintiff in no contract or other obligation to any other person. The property in these plans doubtless has been acquired by the plaintiff, but the plaintiff does not contend that the defendant has taken this property. The plaintiff apparently contends that, having adopted plans, made surveys, and conceived development projects prior to any expression by the defendant of intention to acquire the waters of the Cuyahoga River, *therefore* the plaintiff acquired a right prior to any that the defendant can constitutionally obtain. That is, priority of thought gives a monopoly of the Cuyahoga River. It cannot be seriously contended that any contract is therein suggested which Ohio legislation impairs. It is equally absurd to intimate that priority of thought is a species of property of which the plaintiff will be deprived without due process of law. The plaintiff does not allege that any property has been actually taken by the plaintiff pursuant to eminent domain proceedings in conformity with the Ohio constitution and statutes. The plaintiff does not allege that any compensation has been made by it to the owners of property

taken under any such proceedings. The plaintiff alleges expense incurred in making plans, surveys, and programs, but none whatever in the acquisition of water rights. To the contrary, such a contention is negatived by Exhibit B, by the fact that the plaintiff's capital is but $10,000, whereas the plaintiff claims the value of its rights to exceed the cost of acquisition by over $6,000,000 (par. XV, Record, p. 44; par. XVIII, Record, p. 46). The plaintiff alleges that it has caused its securities to be sold up to the amount of $350,000 *par* value. What amount the plaintiff actually received for those $350,000 par value securities on $10,000 capital, the bill does not disclose. Nor does the bill show that one cent was paid for any rights, riparian or otherwise, acquired and taken. In fact, the plaintiff lays claim to riparian rights, not by force of ownership or title, but by reason of the indirect suggestion of an equitable title based on the rather illogical reasoning that incorporation in 1908, plus amendment of purposes of incorporation in 1912, plus the formulation of plans, the making of surveys, etc., gives to plaintiff, as a legal conclusion, a latent or dormant monopoly of the waters of Ohio, which not even a municipal division of the state or the people of the state in municipal divisions can interfere with for the needs of a water supply or in any way without violating the United States Constitution.

The mere making of plans, even filing them with the proper authorities, gives the plaintiff no such standing before the Court as to give the Court jurisdiction.

Ramapo Water Co. v. *City of New York*, 236 U.S. 579.

Underground R.R. of New York v. *New York, supra.*

Bienville Water Supply Dist. v. *Mobile*, *supra.*

St. Louis & S.W. Ry. Co. v. *Miller Levee Dist.*, 197 Fed. 815.

Adirondack Ry. Co. v. *New York*, *supra.*

Bauman v. *Ross*, *supra.*

N.Y.C. & H.R. R.R. v. *State*, 55 N.Y.S. 685.

What the plaintiff appears to rely upon is not that mere incorporation and organization and the specification of its purposes gives it a standing before the Court, but that by virtue of its adoption of plans it has thereby acquired a right to appropriate the property of others included in this plan; that this right has thereby acquired a priority over all others, except perhaps the State acting directly upon this property. Upon this point a large number of cases is cited and many quotations are made relating to priorities of railroad appropriators.

It is obvious that these cases do not present the question here. A railroad location is of a definite right of way which may be indicated by plans and descriptions. In some states the filing of such a location is itself the act of appropriation, by which the rights of the parties become fixed. Until such filing, or other publication, at least, the location is wholly an internal act on the part of the corporation, subject to its own control. It is, as it were, a mental resolve on the part of the corporation. It seems that, as to those outside the corporation, such an internal act confers on the corporation no actual rights.

Undoubtedly, as a mere matter of expediency between private railroad corporations, the corporation which first

commences the exercise of the right to appropriate should be held entitled to retain the property appropriated. By any other rule there would be no end to the conflicting appropriations of such corporations. But, as between a private corporation vested with the right of eminent domain for carrying on a business of a quasi-public nature and a subdivision of the sovereign state like a municipal corporation, which exercises the power of eminent domain to meet the most vital needs of its population for a supply of pure water for domestic purposes, there can be no question but that the latter is given a paramount right to appropriate property needed for that purpose although the same property has become the subject of earlier appropriation proceedings by a private corporation. It is inconceivable that it should be otherwise. The right given is commensurate with the need, and must be so to be effective. It is a paramount right given from the necessities of the case that the vital needs of the people shall not be denied.

The case on which the plaintiff seems to rely as to the relative rights of a municipality and a private corporation is that of *Suburban Rapid Transit Co.* v. *New York City*, 128 N.Y. 510. The decision is not that the legislature *could* not authorize the city to exclude the railroad from its park, but that it *did* not. Although the railroad had not paid the compensation of the land owners or commenced construction, yet, in the language of the report, "it had by condemnation acquired a strip" across the territory subsequently taken for a park. But it is submitted that the real distinction between that case and the present is that already indicated — that the railroad, being bound to its

location as determined, not by themselves, but by the Rapid Transit Commissioners, had a right to operate its railroad. The implication is clear that, had the incorporation been under the general law, no such right would have existed. The case resolves itself, not into a contest between a private corporation and a municipality, but between officers of the state and a municipality, and the Court holds that there was no conflict.

On the other hand, it is submitted that the case of *Underground R.R.* v. *New York City*, 193 U.S. 416, is wholly against the plaintiff's contention. In that case, under the railroad law, the railroad had filed its map and the location of its route. All that remained before construction and operation was the consent of the requisite owners and of those having control of the streets. These assents, it is submitted, are exactly analogous to the provision of the Ohio laws which make payment the necessary antecedent of construction and operation.

It may also be fairly said that the principle of *Adirondack Ry.* v. *New York State*—that for a great public purpose the state's appropriation is supreme—is as applicable to its governmental subdivisions, charged with the health and safety of its people.

While it may be that, as to rival railroad companies, priority in location of the right of way may, in some cases, give priority of right to construct the railroad upon that location, this is not the case under the laws of Ohio, where the actual payment of compensation must precede the acquisition of rights in private property. Nor is that doctrine applicable where such an assumed conflict exists between a private corporation organized

for private profit and the sovereign state, or a political subdivision, in its enterprises to secure a public water supply for a municipality. This issue has so recently been before this Court that further elaboration of this contention is perhaps unnecessary.

Ramapo Water Co. v. *City of New York*, 236 U.S. 579.

The right of this plaintiff is further negatived by the express admission in the bill (par. XIV, p. 43) that another corporation, The Western Reserve Water Company, was incorporated in February, 1912, under the laws of Ohio, for the purpose of utilizing the waters of the Cuyahoga River. Without further allegation in the bill, that admission denies the exclusive monopoly franchise and privilege upon which plaintiff bases its equitable title, which it sets up as the property of which it is deprived, and the contract which is impaired in violation of the United States Constitution.

The property alleged to be taken is of too intangible and contingent a nature to justify the interference of this Court upon the constitutional grounds alleged. Too much still remains to be done before the corporation may exercise its franchises.

In re New York Cable Ry. Co., 40 Hun, 1.
Williams v. *State*, 23 Tex. 264.

Prospective profits are not property within the meaning of the Constitution.

Munn v. *People*, 69 Ill. 80.

Nor is the indefinite equitable title upon which the plaintiff relies any species of property.

The fact that large expense has been incurred does not assist the plaintiff.

In re New York Cable Ry. Co., 40 Hun, 1.

To found a claim of contract or other rights upon expenditures for this purpose would open the door to endless litigation with corporations having no bona-fide intention of carrying out their projects.

This is apparent from the fact that paragraph IV (Record, p. 37) of the plaintiff's bill, states, not an exclusive franchise, but merely certain powers. By other allegations it appears that another private corporation, The Western Reserve Water Company, has been created and granted certain franchises with reference to the Cuyahoga River. There is nothing inconsistent in the incorporation of both companies by Ohio, and the plaintiff makes no claim that the granting of rights to the second corporation impairs the charter, franchise, or other rights granted to the plaintiff by the United States Constitution. And such a contention could not be seriously made.

Charles River Bridge v. *Warren Bridge*, 11 Peters, 420.

And yet the plaintiff, admitting the valid incorporation of another private corporation which is also granted by Ohio the power to utilize the waters of the Cuyahoga River for certain purposes, suggests that a federal question is raised when a branch of the state of Ohio, acting pursuant to general laws, which were in force at the time of the incorporation of the plaintiff, for the purpose of supplying water to part of the people of Ohio, takes measures to preserve and conserve that water for the benefit of its people. The admission by the plaintiff

that The Western Reserve Water Company has rights in the Cuyahoga River necessarily denies the exclusive right, privilege, and franchise of the plaintiff, and it is upon the *exclusiveness* of the right, privilege, and franchise that the plaintiff bases its contention as to the raising of a constitutional question.

b. The Institution of Appropriation Proceedings is Insufficient.

The institution of proceedings preliminary to the appropriation of property by the plaintiff does not constitute the acquisition of property so that the plaintiff may claim the issue of a federal question. The plaintiff impliedly admits that it has no absolute title or any legal claim as against all the world, but advances the theory that it has an equitable title to certain riparian rights by virtue of priority of thought, priority of making plans, surveys, and programs for development, and by virtue of having taken *any* step in anticipation of appropriating property, and claims to be, therefore, "the riparian owner on such river, absolutely as to third parties, and conditionally as to the holders of title" (par. XII, Record, p. 41). But this theory is without force, since, if the right which the plaintiff claims is "property" of which the plaintiff cannot be deprived under the United States Constitution, it is equally "property" of which the true owners cannot be deprived under the Ohio constitution, without compensation being first made in money; and the plaintiff does not allege that any rights or equitable claims have been acquired by the payment of compensation.

Mansfield v. *Balliett*, 65 Ohio St. 451, 470, 471.

For the Court to take jurisdiction on the ground that a question under the United States Constitution is raised, the Court must recognize the fact that the basis of the jurisdiction is plaintiff's own illegal and unconstitutional action, and clearly the plaintiff does not come into equity "with clean hands."

If the plaintiff has acquired any title to the lands or rights of the riparian owners on the Cuyahoga River, such acquisition must have been in conformity with constitutional statutes of Ohio. This Court may take judicial notice of these laws for the purpose of determining the legality of any such acquisition.

> *North American Cold Storage Co.* v. *Chicago*, 151 Fed. 120.

The Ohio constitution provides, art. I, sec. 19:

> "Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war, or other public exigency imperatively requiring its immediate seizure or for the purposes of making or repairing roads, which shall be open to the public without charge, a compensation shall be made to the owner, in money, and in all other cases where private property shall be taken for public use a compensation therefor shall *first* be made in money, or *first* secured by a deposit of money, and such compensation shall be assessed by a jury without deduction for benefits to any property of the owner."

Takings by the plaintiff of riparian or any rights cannot therefore be made until payment has been made or

secured. The statutes under which the p... ·tiff purports to have commenced its proceedings recognize the constitutional necessity for payment or security for payment before any rights shall vest in the condemning corporation.

These statutory provisions of the Ohio General Code regulating the appropriation of property by private corporations contain the following:

> "SECTION 10128. Any company or companies organized for the purpose of erecting or building dams across rivers or streams in this state to raise and maintain a head of water, or for constructing and maintaining canals, locks, and race-ways to regulate and carry such head of water to any plant or power house where electricity is to be generated, or for erecting and maintaining a line or lines of poles wherein to attach or string wires or cables to carry and transmit electricity, or for transporting natural gas, petroleum, water or electricity, through tubing, pipes or conduits, or by means of wires, cables or conduits, or for storing, transporting or transmit ting water, natural gas or petroleum or for generating and transmitting electricity, may enter upon any private land for the purpose of examining or surveying a line or lines for its tubing, pipes, conduits, poles and wires, or for a reservoir, dams, canals, race-ways, plant or power house, and for ascertaining the number of acres overflowed by reason of the construction of such dam or dams, and may appropriate so much thereof as is deemed necessary for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoir, plant and power house, as well as the land

overflowed, and for the erection of tanks and reservoirs for the storage of water for transportation and the erection of stations along such line or lines, and the erection of such building as may be necessary for the purpose aforesaid.

"SECTION 10129. Such appropriation shall be made in accordance with the law providing for compensation to the owners of private property appropriated to the use of corporations. So far as the rights of the public therein are concerned, the county commissioners as to county and state roads, the township trustees as to township roads, and the councils of municipal corporations as to streets and alleys in their respective jurisdictions, subject to such regulation and restrictions as they prescribe, may grant to such companies, the right to lay such tubing, pipes, conduits, poles and wires therein. But the right to appropriate for any of the purposes above specified, shall not include or extend to the erection of any tank, station, reservoir, or building, or lands therefor, or to more than one continuous pipe, conduit, or tubing or land therefor, in or through a municipal corporation, unless the council first consents thereto (Rev. Sts. sec. 3878)."

The law providing for compensation to the owners of private property appropriated to the use of corporations, so far as here pertinent, is as follows:

"SECTION 11038. Appropriation of private property by corporations must be made according to the provisions of this chapter (Rev. Sts. sec. 6414).

"SECTION 11059. Upon payment to the party

entitled thereto, or deposit with the probate judge of the amount of the verdict and such costs as lawfully accrued in the case up to the time against the corporation, it will be entitled to take possession of, and hold, the property, rights or interests so appropriated, for the uses and purposes for which the appropriation was sought, as set forth in the petition. The judge shall enter of record an order to that effect, and if necessary, proper process shall be issued to place the corporation in possession thereof (Rev. Sts. sec. 6433).

"SECTION 11060. The corporation may abandon any case or proceeding after paying into court the amount of the defendants' costs, expenses, and attorney fees, as found by the court. If the corporation fails in any case to make payment or deposit, as provided in the next preceding section, within thirty days after confirmation of the verdict, on motion of the party entitled to such payment, to be filed within ten days after the expiration of such thirty days, the judge shall enter an order directing the corporation to make such payment or deposit within thirty days after the date of the order. Unless such corporation, within such time makes such payment or deposit, it shall be held thereby to have abandoned the property, rights, or interests so appropriated, and all claims thereon under its proceeding, and the judge shall issue an order to that effect. He shall also enter a judgment against the corporation, and in favor of the party entitled to such payment, for such amount of expenses, including time spent and attorney fees incurred by him in the proceeding, as, upon the

evidence offered in that behalf, the court deems just, for which execution may be issued against the corporation. The directors of the corporation, shall be individually liable upon such judgment, and may be made parties thereto by action (Rev. Sts. sec. 6434).

"SECTION 11070. After final judgment, on depositing the amount of the judgment and costs assessed in such court with the clerk thereof, the corporation may be entitled to enter into possession of the property sought to be appropriated. In case such court is not in session when the proceedings are begun therein nor on the day fixed for the inquiry and assessment of compensation, a special term thereof must be held as provided by law (Rev. Sts. sec. 6440).

"SECTION 11074. The court forthwith shall appoint some master, or other suitable person selected by the parties, to hold such fund, or invest it in the manner the court directs, after hearing the parties. Such fund henceforth will represent the land, and the interests therein, and be subject to the control of the court having jurisdiction of the case, by orders entered in this action, according to the rights of the parties to the land or fund, as from time to time it determines (Rev. Sts. sec. 6443).

"SECTION 11087. If the corporation fails to pay the judgment and costs awarded against it in the proceeding, they may be collected by execution as in other cases. This section and the next preceding section shall not impair or lessen the right the owner or owners or the trustees or school officers may have to proceed against the corporation as in

other cases of the unlawful entry upon lands (Rev. Sts. sec. 6449).

"SECTION 11088. If execution issued as provided in the next preceding section be returned unsatisfied, in whole or part, with the indorsement that no goods, chattels, lands or tenements, can be found whereon to levy, or if the judgment remains unsatisfied for more than sixty days from its rendition, the court, by injunction, may restrain the corporation from using or occupying the lands until the judgments and costs are paid (Rev. Sts. sec. 6450).

"SECTION 11091. The provisions of this chapter shall not apply to proceedings by state, county, township, district, or municipal authorities, to appropriate private property for public uses, or for roads or ditches. In all such cases it shall be optional with such authorities to pay the judgment rendered against them, or to pay the costs and decline to take the property sought to be appropriated (Rev. Sts. sec. 6453)."

It is obvious, therefore, that, under these constitutional and statutory provisions, no title to these riparian rights, or to any rights, has vested in the plaintiff. Prepayment or security is a necessary preliminary step, and plaintiff does not allege the performance of such.

Dayton & Western Ry. Co. v. *Marshall*, 11 Ohio St. 497.
State v. *Cincinnati &c. Ry.*, 17 Ohio St. 103.

The corporation may discontinue its proceedings at any time, at least before the case is submitted to the

jury. And, under section 11,060, may abandon the proceedings at any time.

Where the constitution or laws require prepayment in takings under the power of eminent domain, no title vests until such payment.

Garrison v. *City of New York*, 21 Wall. 196, 204.
People v. *Williams*, 51 Ill. 63.
Cook v. *South Park Commissioners*, 61 Ill. 115.
Phillips v. *South Park Commissioners*, 119 Ill. 626.
Lake Erie & W. Ry. Co. v. *Kinsey*, 87 Ind. 514.
People v. *Law*, 34 Barb. 494.
Blodgett v. *Utica & B. R. Co.*, 64 Barb. 580.
In re Opening Avenue D in New York, 93 N.E. Rep. 498.
N.Y.C. & H.R. R.R. Co. v. *State*, 55 N.Y. S. 685.
Zimmerman v. *Kansas City & N. W. R. Co.*, 144 Fed. 622.

And this is the rule of the Ohio Courts with reference to takings under Ohio statutes and the Ohio constitution.

Grant v. *Hyde Park*, 67 Ohio St. 166, 178.
Bothe v. *Ry. Co.*, 37 Ohio St. 147.
State v. *Cincinnati &c. Ry.*, 17 Ohio St. 103.

In the latter case the Court says (p. 108), after referring to the express constitutional requirements:

"No appropriation of the lands of the relators could be completed, no title from them could be

> acquired, and no encumbrance could be imposed on their estate by the railroad company until the amount of compensation fixed by the finding of the jury was paid in money or secured to be paid by a deposit of money."

Such a rule is obviously inconsistent with the plaintiff's theory of a conditional title, which is absolute as to third parties.

It is submitted, therefore, that the plaintiff has not shown any property right, privilege, or immunity of which he is deprived, and the District Court properly declined jurisdiction.

IV.

The Bill Fails to Show Deprivation "of Any Right Secured by Any Law of the United States Providing for Equal Rights of Citizens of the United States, or of All Persons within the Jurisdiction of the United States."

The bill alleges no violation of any Act of Congress and no violation of any rights dependent upon any law of the United States. Beyond the statement in paragraph II, "that this suit arises under the Constitution and Laws of the United States," there is no allegation with respect to the violation of any such law, and it is submitted that the jurisdiction of this Court is not claimed on that ground, but, if claimed, is not maintained by sufficient allegations in the bill.

V.

The Bill of Complaint Alleges No Infringement of Constitutional Rights.

The following allegations of constitutional questions are made in the plaintiff's bill:

A. Under the United States Constitution it is alleged —

1. That the defendant violates the Fourteenth Amendment by violating section 3681 of Ohio General Code (par. XXII, Record, p. 50).

2. That Ohio General Code, secs. 3677 and 3679, Ohio House bill No. 357 and resolution No. 3241, and ordinance No. 3396 of the defendant impair the obligation of contract in violation of article I, sec. 10 (par. XXVI, Record, p. 52).

3. That the defendant violates the Fourteenth Amendment by seizure and appropriation of plaintiff's property and franchises without compensation (par. XXVI, Record, p. 51).

4. That the defendant impairs obligation of contract, takes without due process, and deprives of equal protection by pretending to take property of the plaintiff without judicial determination of necessity therefor (par. XXVI, Record, p. 52).

5. That the defendant violates the Fourteenth Amendment and article I, sec. 10, by all acts alleged in bill (par. XXXVI, Record, p. 56).

The provisions of the Ohio law relating to the process by which property is taken by municipal corporations for public use, so far as applicable, are as follows:

> "SECTION 3677. Municipal corporations shall have special power to appropriate, enter upon and hold, real estate within their corporate limits. Such power shall be exercised for the purposes, and in the manner provided in this chapter.
>
> . . . . . .

"13. For providing for a supply of water for itself and its inhabitants by the construction of wells, pumps, cisterns, aqueducts, water pipes, dams, reservoirs, reservoir sites and water works, and for the protection thereof; and to provide for a supply of water for itself and its inhabitants, any municipal corporation may appropriate property within or without the limits of the corporation; and for this purpose any such municipal corporation may appropriate in the manner provided in this chapter, any property or right or interest therein, theretofore acquired by any private corporation for any purpose by appropriation proceedings or otherwise. Either party to such appropriation proceedings shall have the same right to a change of venue as is now given by law in the trial of civil actions."

Ohio General Code, as amended March 10, 1910.

Laws of Ohio, vol. 101, p. 15.

"SECTION 3678. In the appropriation of property for any of the purposes named in the preceding section, the corporation may, when reasonably necessary, acquire property outside the limits of the corporation. No land shall be appropriated or obtained for public cemeteries within two hundred yards of a dwelling house without the consent, in writing, of the owner of the tract of land on which such dwelling house is situated.

"Section 3679. When it is deemed necessary to appropriate property, council shall pass a resolution, declaring such intent, defining the purpose of

the appropriation, setting forth a pertinent description of the land, and the estate or interest therein desired to be appropriated. For water works purposes and for the purpose of creating reservoirs to provide for a supply of water, the council may appropriate such property as it may determine to be necessary.

"SECTION 3680. Immediately upon the passage of such resolution, declaring such intent, for which but one reading shall be necessary, the mayor shall cause written notice thereof to be given to the owner, person in possession thereof, or having an interest of record in, every piece of property sought to be appropriated, or to his authorized agent, and such notice shall be served by a person designated for the purpose, and return made in the manner provided by law for the service and return of summons in civil actions. If such owner, person, or his agent can not be found, notice shall be given by publication once a week for three consecutive weeks in a newspaper of general circulation in the corporation, and council may thereupon pass an ordinance by the votes of two-thirds of all members elected thereto, directing such an appropriation to proceed.

"SECTION 3681. Upon the passage of such ordinance, the solicitor shall make application to the court of common pleas or to a judge in vacation, to the probate court, or to the insolvency court, in the county in which the land sought to be taken is located, which application shall describe as correctly as possible the land to be appropriated, the interest or estate therein to be taken, the object

proposed, and the name of the owner of each lot or parcel thereof.

"SECTION 3682. Notice of the time and place of such application shall be given in the ordinary manner of serving legal process, to all owners or agents of owners resident of the state, whose place of residence is known, and to all others by publishing the substance of the application, with a statement of the time and place at which it is to be made, once a week for three weeks next preceding the time of the application in some newspaper of general circulation in the county.

"SECTION 3683. If it appears that such notice has been served five days before the time of application, or has been duly published, or that such notice has been waived, the court shall set a time for the assessment of compensation by a jury, but it may be made at a special term of court, and the jury shall be drawn and the trial proceed as in other civil actions.

"SECTION 3684. A view of the premises shall be ordered when desired by the jury or demanded by a party to the proceedings. The owners shall have the right to open and close the case.

"SECTION 3685. If, at the time of the application, it appears that any of the owners of the property sought to be taken are infants or insane, and that they have no guardian, a guardian *ad litem* shall be appointed in their behalf.

"SECTION 3686. No delay in the proceedings shall be occasioned by doubt as to the ownership of any property, or as to the interest of the respective owners, but in such cases the court shall require a

deposit of the money allowed as compensation for the whole property or the part in dispute. As soon as the corporation shall have paid the compensation assessed, or secured its payment by a deposit of money under the order of the court, possession of the property may be taken.

"SECTION 3687. The assessment shall be in writing, signed by the jury, and shall be so made that the amount payable to the owners of each lot or parcel of land may be ascertained.

"SECTION 3688. When a building or other structure is situated partly upon the land to be appropriated, and partly upon adjoining land, and such structure can not be divided upon the line between such lands, without manifest injury, the jury in assessing compensation to any owner of the land, shall assess the value thereof, exclusive of the structure, and make a separate estimate of the value of the structure. The owner of the structure may elect to retain and remove it, or to accept the value thereof as estimated by the jury. If he fails to make such election within ten days from the final determination of the cause, he shall be deemed to have elected to accept the value of the structure, as fixed by the jury.

"SECTION 3689. The jury shall be sworn to make the whole inquiry and assessment, but may return a verdict as to part and be discharged as to the rest, in the discretion of the court. If a jury is discharged from rendering a verdict in whole or in part, another shall be drawn and impaneled at the earliest convenient time, who shall make the whole inquiry and assessment, or the part not made.

"SECTION 3690. The court shall make such order as to payment, deposit or distribution of the amounts assessed as may seem proper, may require adverse claimants to all or a part of the money or property to interplead and fully determine their rights in the same proceeding, and may direct the time and manner in which possession of the property condemned shall be taken or delivered, and may, if necessary, enforce any order giving possession.

"SECTION 3691. Upon the payment or deposit, by the corporation, of the amount assessed, as ordered by the court, an absolute estate in fee simple shall be vested in such corporation, unless a lesser estate or interest is asked for in the application, in which case such lesser estate or interest as is so asked for shall be vested.

"SECTION 3692. A municipal corporation may again appropriate, in conformity with the provisions of this chapter, any real estate which it has previously lawfully appropriated, in order to perfect, in it, a title in fee simple absolute to such previously appropriated real estate.

"SECTION 3693. The costs of the inquiry and assessment shall be paid by the corporation, and all other costs taxed as the court directs. At or after the time of making the application, the corporation may offer to confess judgment for an amount to be stated, and the costs then made, in favor of any owner, who in any manner enters appearance, or upon whom or whose agent personal service may be made. If such owner refuses to accept such offer, and on the trial does not recover more, he shall pay all costs accruing after the offer, and an

offer so made shall be governed by the provisions of statute for an offer to confess judgment.

"SECTION 3694. Before or after the passage of an ordinance for opening a street or other public highway, any person may execute his bond payable to the corporation of all damage which may be assessed by the jury, and such bond shall be good in law, and if such person pay or deposit according to the order of court, then such street or other highway shall be opened; or the corporation may at its discretion make such payment or deposit, and collect by law the amount of such damages of such person or his sureties.

"SECTION 3695. The municipal corporation, or the owner of property, the value of which has been assessed, as herein provided, may prosecute error as in other civil actions, and error shall lie to the circuit court from the judgments of the court, except that from the judgments of the probate court error shall lie to the court of common pleas. The trial court, upon proper terms, may suspend the execution of any order, but in all cases where the municipal corporation pays or deposits the compensation assessed, and gives adequate security for any further compensation and costs, the right to take and use the property condemned shall not be affected by such review.

"SECTION 3696. If the proceeding is had in the probate court a party interested in the inquiry and assessment may take an appeal to the court of common pleas and thereupon the same proceeding shall be had as if the application had been originally made in that court, except that the corporation

shall not be required to give notice of its application, and the inquiry and assessment shall be limited to the case of the party taking the appeal, and the court shall make such order for the payment of the costs accruing upon the appeal as seems equitable and just.

"SECTION 3697. When a municipal corporation makes an appropriation of property, and fails to pay or take possession thereof, within six months after the assessment of compensation shall have been made, its right to make such appropriation on the terms of the assessment so made shall cease and determine, and lands so appropriated shall be relieved from all incumbrance on account of any of the proceedings in such case, and the judgment or order of the court directing such assessment to be paid shall cease to be of any effect, except as to the costs adjudged against the corporation. Upon motion of any defendant, such costs may be retaxed, and a reasonable attorney's fee paid to the attorney of such defendant, which, together with any other proper expenses incurred by the defendant, may be included in the costs."

The allegations above mentioned will be considered in order:

1. The violation of a state statute by a municipal corporation is not an act of a state which deprives of property without due process, or denies the equal protection of the law, contrary to the Fourteenth Amendment.

The plaintiff contends that the defendant is violating the laws of Ohio (Assignments of Errors XIX, XXII,

Record, pp. 64, 65). It is obvious that by such a contention the plaintiff removes its case from the jurisdiction of the District Court of the United States. This is in effect an assertion that the defendant is a malefactor, taking the property of others without authority of the state of Ohio. So far from being acts of the state, upon this view of the plaintiff's case, the acts of the defendant are without authority of the state. Controversies arising out of violations of state law are obviously to be dealt with by the courts of the states. The allegations of the bill are, in brief, that the state statutes under which the plaintiff purports to act have been repealed (Bill, par. XX, Record, p. 48), and that therefore the defendant is acting without any authority whatever. On this ground alone the District Court was justified in refusing to entertain jurisdiction.

Barney v. *City of New York*, 193 U.S. 430.

2. The contention that the stated legislation of Ohio and the acts of defendant impair the obligation of contract is without merit.

The acts of the defendant performed under those statutes are in the exercise of the power of eminent domain delegated to it by the state. To this power all property is subject, and, if the requisites of compensation and due process are provided for, in its exercise there is no impairment.

> "There enters into every engagement the unwritten condition that it is subordinate to the right of appropriation to a public use."
>
> *West River Bridge Co.* v. *Dix*, 6 How. 507
> *Cincinnati* v. *L. & N. R.R.*, 223 U.S. 390.

Long Island Water Supply Co. v. *Brooklyn*, 166 U.S. 685.
St. Anthony Falls Water Power Co. v. *Water Com. of St. Paul*, 168 U.S. 349.

And, under the provision of the Ohio constitution already referred to (art. XII, sec. 2), any contract which the plaintiff may have is subject to alteration and repeal by subsequent legislation or action by the state.

Such a contract is also subject to all laws in effect at the time the contract was made.

Blackstone v. *Miller*, 188 U.S. 189.
Lehigh Water Co. v. *Easton*, 121 U.S. 388.
Mississippi &c. R. Co. v. *McClure*, 10 Wall. 511.

It was no part of the alleged contract, franchise, or charter granted by Ohio that the rights so obtained would not be subject to the sovereign power of eminent domain. Such a contract would be void.

Long Island Water Supply Co. v. *Brooklyn*, 166 U.S. 685.
West River Bridge Co. v. *Dix*, 6 How. 507.

It is stated in *Kiser* v. *Commissioners*, 85 Ohio St. 129, 134:

> "There can be no doubt that the dam and water rights belonging to the plaintiff in error could have been removed in the improvement of the living stream for the public welfare . . . because all private property is held 'subservient to the public welfare', whether it has been abandoned or not: but 'private property shall ever be held inviolate'

(Const. Art. I. Sec. 19) and when the owner is compelled to yield his rights to public use, he is guaranteed compensation."

The Ohio General Code was compiled in 1910, two years after the alleged incorporation of the plaintiff, and the plaintiff claims sections 3677 and 3679 of that code to impair the contract of plaintiff, expressed in the charter. As a matter of chronology it may be admitted that the contract upon which the plaintiff relies was made in 1908, in order to afford to plaintiff any argument as to priority. But the bill is lacking in any allegations as to what that contract was in 1908; there is no evidence in the bill as to the powers, purposes, or rights thereby acquired by the plaintiff at any time prior to the time of the amendment of its articles of incorporation in 1912. The bill is devoid of evidence from which this Court can find the terms and provisions of any contract alleged to be impaired. The mere fact of incorporation (which is all that plaintiff alleges) is evidence *only* of that fact and does not show any contract which this Court can fairly say was impaired by the enactment of General Code, secs. 3677 and 3679, in 1910.

The provisions of the General Code of 1910, sec. 3677, as amended, already quoted herein, giving to municipalities power to appropriate property for public purposes, in fact are merely a codification of similar provisions existing long prior to 1910 and long prior to the incorporation of the plaintiff.

By section 2232 of the Revised Statutes of Ohio, passed March 8, 1887, it was provided that - -

"Each city and village, may appropriate, enter

upon, and hold, real estate within its corporate limits for the following purposes, but no more shall be taken or appropriated than is reasonably necessary for the purpose to which it is to be applied.

. . . . . .

"12. For water-works; and for this purpose the right to appropriate, shall not be limited to land lying within the limits of the corporation."

By an Act passed October 22, 1902, it was provided as follows:

"SECTION 9. All municipal corporations shall have the following special powers which shall be exercised in the manner hereinafter provided:

"First: To appropriate property for public purposes.

. . . . . .

"SECTION 10. All municipal corporations shall have power to appropriate, enter upon, and hold real estate within the corporate limits, for the following purposes:

. . . . . .

"Eleventh: For water-works, natural and artificial gas and electric lighting, heating, and power plants, and for supplying the products thereof.

"SECTION 11. In the appropriation of property for any of the purposes named in the preceding section the corporation may, whenever the same is reasonably necessary acquire property outside the limits of the corporation . . ."

Laws of Ohio, vol. 96, pp. 26, 27.

By an Act passed April 27, 1908, sub-section 11 of section 10 was amended so as to read as follows:

"11. For water works, for reservoirs to provide a supply of water, for natural and artificial gas, electric lighting, heating and power plants, and for supplying the product thereof."

Laws of Ohio, vol. 99, p. 207.

In the General Code of 1910 the language of sub-section 11, as it appears in the Act of April 27, 1908, is repeated, and by the amendment of March 10, 1910, the subject of waterworks is omitted from sub-section 11, and a new sub-section, 13, as stated on page 30 of this brief, was added.

It is not deemed material to pursue the history of this legislation in its earlier stages, since, from the above summary, it appears that at least as early as 1887 municipal corporations in Ohio had the power to appropriate property for waterworks as well as for other purposes. The bill does not disclose the date of the incorporation of the defendant municipality, but there is nothing in the bill inconsistent with such incorporation long prior to the incorporation of the plaintiff, and the Court may take judicial notice of the fact. The plaintiff alleges its incorporation in the year 1908.

It is clear, therefore, that long before the incorporation of the plaintiff, powers of eminent domain had been conferred upon the defendant. Any rights, therefore, which the plaintiff may have acquired by its incorporation in 1908, were subject, not merely to the general rights of eminent domain, to which private property is subject, and the reserved rights of amendment, alteration, and repeal, to which the charters of Ohio corporations are subject, but also to actually existing powers of eminent domain conferred upon the

defendant by legislation enacted long prior to the charter of the plaintiff. If the doctrine asserted by the plaintiff — that priority of incorporation and organization give a priority of right to appropriate — were sound, the advantage of such priority would be clearly with the defendant.

House bill No. 357 is an Act of the legislature of Ohio enacted May 7, 1911, and is as follows:

> "SECTION 1. That there is hereby granted to the City of Akron, in the County of Summit, and State of Ohio, the right to divert and use forever for the purpose of supplying water to said City of Akron and inhabitants thereof, the Tuscarawas River, the Big Cuyahoga and Little Cuyahoga Rivers, and the tributaries thereto, now wholly or partly owned or controlled by the state and used for the purpose of supplying water to the northern division of the Ohio Canal, provided, however, and this grant is upon the condition that at no time shall said city use the waters of any such stream, to such extent or in such manner as to diminish or lessen the supply now necessary, to maintain the flow in and through the canal as said canal now exists or as hereafter may become necessary for navigation purposes for an enlarged canal and upon the further condition that the City of Akron shall at all times save the state harmless from all claims arising from such grant and construction thereunder.
>
> "SECTION 2. There is hereby granted to said City of Akron for the waterworks purposes as aforesaid the right to enter in and upon and occupy the lands of the state in said Summit County to develop additional storage either by the construction of new

reservoirs or dams, or the enlargement of those already constructed by the state on said rivers, always provided that said construction or enlargement will not result in any interference with or diminution of the supply now necessary for said canal for navigation purposes. And, provided, further, that before any such construction of reservoirs or dams, or enlargement of reservoirs or dams now existing shall be commenced, the plans and specifications therefor be first approved by the chief engineer of the state board of public works. And further provided, that any diversion or impounding on the lands of the state of said Tuscarawas River and the tributaries thereto, by said City of Akron, shall be east of highway known as South Main Street extended south. And if the waters of said Tuscarawas River are impounded, used or diverted by said city, the amount of the flow as now and hereafter used and controlled by the state shall not be diminished by such impounding, use or diversion by said city during the months of June, July, August, September, October and November; and at no time shall said City of Akron take or use from any reservoir constructed on the Tuscarawas River an amount of water in excess of an annual average of fifteen million gallons per day, unless with the approval of the board of public works and upon such terms and conditions as may be agreed upon between the said board of public works and said City of Akron, and the chief engineer of the said board of public works shall at all times have access to said property for the purpose of ascertaining the amount of water that is being used by said City of Akron.

"The governor shall appoint a commission of three arbitrators to fix the compensation to be paid the state by the City of Akron for any lands or property, exclusive of water, taken by the City of Akron under the provisions of this act.

"Provided that any money accruing to the state under this act shall be paid into the state treasury to the credit of the general revenue fund.

"SECTION 3. The governor, upon behalf of the state shall execute and deliver to the City of Akron, Summit County, Ohio, a grant of the right to use forever the water of such streams, as herein provided, under the provisions herein set forth and for the purpose herein stated.

"The attorney general shall prepare the form of said grant."

House bill No. 357 does not impair any contract. Assuming that that Act is constitutional under the Ohio constitution (which the plaintiff denies), it must be so, not as a grant of special powers (art. XIII, sec. 1), but as a release by the state of any possible claim arising from an insubstantial interference with the navigability of the Ohio canal by reason of any acts of the defendant, in connection with its use of the waters of the Cuyahoga River. But that Act also became law prior to 1912 (May 7, 1911, according to plaintiff's allegation, par. XIX, Record, p. 46), and the contract, if any, was made subject to that then existing Act. It is equally impossible for this Court to say that the contract was impaired by the passage of that Act, since the terms of the contract at that time are not before the Court.

Nor can this Court say that resolution No. 3241 is unconstitutional as an impairment of any contract of the plaintiff. The terms of that resolution are not before the Court. The bill contains merely the allegation (par. XXI, Record, p. 49) that the defendant, on May 27, 1912, purported to pass a resolution "declaring intention to appropriate property for water-supply purposes." It does not appear that that resolution interferes with any rights of the plaintiff, contract in nature or otherwise, for the language of that resolution is not included in the record.

Nor does the passage of ordinance No. 3396 impair any contract except so far as it is the authorized method of exercise of the power of eminent domain. But, as previously argued, an act of the state in the exercise of this power is not unconstitutional as an impairment of the obligation of contract, provided that act conforms with the Fourteenth Amendment. A contract is not impaired by the exercise of eminent domain; rather, the contract is made subject to the exercise of that power.

> *Cincinnati* v. *L. & N. R.R. Co.*, 223 U.S. 390.
> *Offield* v. *N. Y., N.H. & H. R.R. Co.*, 203 U.S. 372.

The contract, if any, being made subject to the constitutional power of amendment or repeal (article XII, sec. 2), is not impaired by this ordinance.

> *Hamilton Gas Light & Coke Co.* v. *Hamilton*, 146 U.S. 258.

The foregoing argument is equally applicable to the claim that the incorporation of the plaintiff was a franchise. By whatever name the technical contract is

called, the fact is apparent that this Court cannot, owing to the insufficiency of allegations, determine what was the contract alleged to be impaired.

3. There has been no seizure and appropriation of the property and franchises of plaintiff without compensation in violation of the Fourteenth Amendment.

Assuming that the plaintiff has alleged the ownership of any property which is the subject of appropriation, for the plaintiff to contend that that property has been taken without compensation is merely an allegation that the defendant has acted unlawfully and without authorization under the laws and constitution of Ohio.

> "Where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money and such compensation shall be assessed by a jury" (art. I, sec. 19).

It may be that it makes no difference whether the statutes under which the defendant has acted conform to or violate this section. In either case the act of the defendant would then be unlawful under the state law, and *its* act, not action by the state, which would violate the Fourteenth Amendment.

Barney v. *New York*, 193 U.S. 430.

But for the reasons previously stated (I, A, 2, *b*), the plaintiff possessed no property of which he could be deprived, or which was the subject of a "taking."

Adirondack Ry. Co. v. *New York State*, 176 U.S. 335.

See *Peabody* v. *United States*, 231 U.S. 530.

In any event it appears that the statutes of Ohio do, in fact, make adequate provision for compensation for any property of the plaintiff that may be taken. This matter will be discussed later.

4. The United States Constitution is not violated because the General Code leaves to the municipal corporation the question of the necessity for the appropriation of property for a public use.

General Code, sec. 3679, provides:

> " . . . For water works purposes and for the purpose of creating reservoirs to provide for a supply of water, the Council may appropriate such property as it may determine to be necessary."

The necessity for the appropriation (the designation or setting apart) is left to the municipal corporation, but this in no manner attempts to vary the limitation of the Ohio constitution (art. I, sec. 19) that when private property is "*taken* for public use, a *compensation* therefor shall *first* be made in money."

That the mere matter of the determination of the *necessity* is not a judicial question, requiring a hearing thereon, is well established.

> *Zimmerman* v. *Canfield*, 42 Ohio St. 463, 471.
>
> "It is not upon the question of the appropriation of lands for public use, but upon that of compensation for lands so appropriated that the owner is entitled to the right of a hearing in Court, and a verdict of a jury."
>
> *Iron R.R.* v. *City of Ironton*, 19 Ohio St. 299, 304.

Applying a statute of Ohio authorizing municipalities to appropriate private property for a public wharf, and prescribing the course of procedure, "when it shall be deemed necessary by any municipal corporation to enter upon or take private property as above provided," the Court has said:

> "Under the statute, the authority and discretion of determining the quantity of ground required by the public for wharf purposes are vested in the corporation, and there is nothing in the petition showing that, in making the appropriation, the municipal authorities acted in bad faith, or that the property is intended to be used for any other purpose than that for which it was appropriated. Under these circumstances, the action of the city is, on this question, final."

People v. *Adirondack Co.*, 160 N.Y. 225, 239:

> "He has a right to his day in Court on the question of compensation, but he has no such right on the question of appropriation unless some statutes require it."

Chandler v. *R.R. Com.*, 141 Mass. 208, 213:

> "Indeed a person has not a constitutional right to be heard upon the question of whether his private property shall be taken for public use, although he has a right to compensation for it, if it is so taken, and to institute proper proceedings therefor."

Secombe v. *R.R. Co.*, 23 Wall. 108:

> "The mode of exercising the right of eminent

domain in the absence of any provision in the organic law prescribing a contrary course is within the discretion of the Legislature. There is no limitation upon the power of the Legislature in this respect. If the purpose be a public one a just compensation shall be paid or tendered to the owner of the property taken."

See also *Long Island &c. Co.* v. *Brooklyn*, 166 U.S. 685.

Kaw Valley Drainage District v. *Water Co.*, 186 Fed. 315.

People v. *Smith*, 21 N.Y. 595.

Dillon on Municipal Corporations (5th ed.), sec. 1036.

Lewis on Eminent Domain, sec. 567.

Cooley on Constitutional Limitations, pp. 759, 760.

But the plaintiff not only does not allege its ownership by the payment of compensation prior to any taking, but also neglects to make any claim of any necessity for its appropriation determined judicially or otherwise.

5. The United States Constitution is not violated by any statutes of Ohio, or by any acts of defendant which could be construed as acts of the state. The attention of the Court is called to General Code, secs. 3677 to 3697, inclusive, which require:

1. An adjudication of necessity by an appropriate public tribunal (sec. 3679).

2. Notice to interested parties of the resolution declaring the intention to appropriate (sec. 3680).

3. An affirmative act directing the appropriation to proceed (sec. 3680).

4. Application to a Court of record for a trial (sec. 3681).

5. Notice of trial to property owners (sec. 3682).

6. A trial by jury upon the measure of compensation (secs. 3683–3689).

7. A right of appeal (secs. 3695, 3696).

8. Payment of or a security for compensation if the municipality elects to complete the taking (secs. 3690, 3691).

If these statutes violate the United States Constitution, it is not apparent wherein sections 10,128 to 11,091 of General Code, under which the plaintiff must have acted, are not equally unconstitutional, in which contingency the plaintiff has failed to prove the basis of its right to raise a constitutional question, viz., its ownership of property. For if there is any merit in the other contention of the plaintiff, that is, that the incorporation in 1908, the amendment of purpose in 1912, and the conception of plans constituted "property," it is to be noted that those same "property" rights must have accrued to the defendant by its incorporation as a municipality and the public necessity that its inhabitants be supplied with pure water. If there is any strength in the argument as to priority, it is entirely to the advantage of the defendant.

As there appears to be no violation of the provisions of the Constitution of the United States, the Court may, upon this ground, affirm the decree.

B. Under the Ohio constitution it is alleged —

1. That House bill No. 357 violates the constitution of Ohio (par. XIX, Record, p. 47).

2. That General Code, sec. 3679, violates article I, sec. 16, and article II, sec. 28 (par. XX, Record, p. 48).

3. That defendant violates article I, sec. 19, by taking for other than a public use what has been devoted to a prior and paramount public use by plaintiff (par. XXXII, Record, p. 55).

It is obvious that the question whether the defendant by its acts, or the state by its legislation, violates the Ohio constitution is not a question arising under the laws and Constitution of the United States. These are matters of which the District Court has no jurisdiction, or at least the assertion of such a question of itself confers no such jurisdiction. Since, however, the plaintiff has raised this question, it may be not out of place to dispose of it as if it were properly before the Court.

1. It is claimed that House bill No. 357 violates article XIII, sec. 1, of Ohio constitution, inasmuch as it is "special legislation." It is submitted that House bill No. 357 confers no "corporate powers," and, if it does, the powers of defendant are ample under the General Code, without the necessity of the protection of that Act. It is difficult to conceive the illogical position assumed by plaintiff in alleging that bill to be "special legislation" and also a law of a general nature which is not of uniform operation throughout the state.

2. Section 3679 violates neither article I, sec. 16, nor article II, sec. 28. This matter has been considered with reference to the federal Constitution and the similar questions there involved.

3. The plaintiff claims violation of article I, sec. 19, that "private property shall ever remain inviolate

but subservient to the public welfare," because defendant has taken for some other than a public use over 180,000,000 gallons of water per day, that water having been devoted to a prior and paramount public use by plaintiff. Such a claim again raises the question of whether plaintiff has any "property" in the water, which has received full consideration. But, even assuming property in plaintiff, that property is subject to eminent domain for a use which is clearly superior. The plaintiff merely alleges its incorporation for the private advantage of its security holders, and does not suggest its devotion to the public welfare.

New Haven Water Co. v. *Wallingford*, 72 Conn. 293.

In re City of Brooklyn, 143 N.Y. 596.

Brady v. *Atlantic City*, 53 N.J. Eq. 440.

Colby University v. *Canandaigua*, 69 Fed. 671.

Little Miami &c. R. Co. v. *Dayton*, 23 Ohio St. 510.

VI.

Consideration of Other Ohio Statutes.

A. Section 11,300 of General Code does not prevent the acquisition of property by defendant. The doctrine of *lis pendens*, invoked by plaintiff, has no application to a case like the present. Appropriation proceedings are not for the enforcement of an existing right or interest, but for the acquisition of a right or interest. The commencement of an action may or may not be notice to the world that the action is pending, and act as a caveat to future purchasers. But appropriation

proceedings are not actions in the usual sense. Until compensation is paid, plaintiff has no interest in the property. To argue that such a proceeding is notice that the petitioner has an interest in a *right to appropriate* is to beg the question, since the existence of that right as against the defendant is the question here at issue.

B. Whether or not House bill No. 357 has been repealed by the constitutional amendment of 1912, cannot affect the rights of the defendant, since the authority and powers of the defendant are based on general, and not on special, legislation.

C. The 1912 constitutional amendment did not repeal sections 3677 and 3679 of General Code. Article XVIII of the constitution recognizes that municipal corporations may still appropriate private property which is not a "public utility," but, assuming that plaintiff *is* a public utility under Ohio law, the attention of the Court is directed to the fact that, upon the plaintiff's allegations, both the resolution and the ordinance were passed several months before article XVIII became effective, which was November 15, 1912, and surely, if the plaintiff really has respect for priority, it must recognize the acquisition of property before that amendment repealed the General Code, secs. 3677 and 3679.

The attention of the Court is also called to article XVIII, sec. 10, of the Ohio constitution:

> "A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such

restrictions as shall be appropriate to preserve the improvement made."

SUMMARY.

The appellee contends that the bill discloses no contract, property right, or interest in the appellant which is the subject of the contract and due-process clauses of the federal Constitution; that, even if the appellant has such rights, those rights have not, under the Ohio law, been taken by the appellee; that such rights are subject to the paramount rights of eminent domain and of amendment, alteration, and repeal reserved to the state of Ohio and delegated to the appellee; that the bill, upon its face, is based upon alleged infractions of state law and not upon federal questions; that the acts of the appellee and the legislation of the state of Ohio are not in contravention of the laws and Constitution of the United States; that the bill states no case arising under the laws and Constitution of the United States, and that therefore the District Court was without jurisdiction.

Respectfully submitted,

CHARLES F. CHOATE, JR.,

JONATHAN TAYLOR.

CUYAHOGA RIVER POWER COMPANY *v.* CITY OF AKRON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 465. Argued October 20, 1915.—Decided March 20, 1916.

As the bill in this case states that a municipality does not intend to institute proceedings to condemn, but does intend to take plaintiff's property rights without compensation, and has taken steps that will destroy such rights, and that in so doing it purports to be acting under an ordinance which violates the contract clause of, and the Fourteenth Amendment to, the Federal Constitution, *held* that such municipal action is to be regarded as action of the State, and as the only way to determine whether plaintiff has rights that the municipality is bound to respect, is to take jurisdiction and determine the case on the merits, the District Court has jurisdiction.

THE facts, which involve the jurisdiction of the District Court, are stated in the opinion.

Mr. Carroll G. Walter and *Mr. John L. Wells*, with whom *Mr. Wade H. Ellis*, *Mr. R. Golden Donaldson* and *Mr. Charles A. Collin* were on the brief, for appellant.

Mr. Charles F. Choate, Jr., with whom *Mr. Jonathan Taylor* was on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by an Ohio corporation against a city of Ohio to prevent the latter from appropriating the waters of the Cuyahoga River and its tributaries above a certain point. It alleges that the plaintiff was incorporated under the laws of Ohio for the purpose of generating hydro-electric power by means of dams and canals upon the said River, and of disposing of the same; that it has adopted surveys, maps, plans and profiles to that end, has entered upon, located and defined the property rights required, has instituted condemnation proceedings to acquire a part at least of such property, has sold bonds and spent large sums and has gained a paramount right to the water and necessary land. The bill also alleges that the City has passed an ordinance appropriating the water and directing its solicitor to take proceedings in court for the assessment of the compensation to be paid. The District Court dismissed the bill for want of jurisdiction on the ground that it presented no Federal question, because if the plaintiff had any rights they could be appropriated only by paying for them in pursuance of the verdict of a jury and a judgment of a court. It made the statutory certificate and the case comes here by direct appeal. 210 Fed. Rep. 524.

It appears to us that sufficient attention was not paid to other allegations of the bill. After setting out various passages from the statutes and constitution of Ohio and concluding that the City has no constitutional power to take the property and franchises that the plaintiff is alleged to own or any property for a water supply, it alleges that the City does not intend to institute any proceedings against the plaintiff but intends to take its prop-

erty and rights without compensation; that it is building a dam and has taken steps that will destroy the plaintiff's rights; that it is insolvent; that the purpose of the ordinance and certain statutes referred to is to appropriate and destroy those rights without compensation; that the defendant purports to be acting under the ordinance, and that in so acting it violates Article I, § 10, and the Fourteenth Amendment of the Constitution of the United States. It is established that such action is to be regarded as the action of the State. *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20. *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278. Whether the plaintiff has any rights that the City is bound to respect can be decided only by taking jurisdiction of the case; and the same is true of other questions raised. Therefore it will be necessary for the District Court to deal with the merits, and to that end the decree must be reversed.

Decree reversed.